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Judge Gould's Lectures.

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Actions ex delicto

Slander.

Slander consists in maliciously defaming a person

1. By words written or spoken which tend to injure him in any point of personal security connexions, office profession or interest
4 Bac 483. 4 Co 14. Bull p. 3 Bl 123. Esp 496.

II. Without words as by figures Pictures or Emblems of the above tendency Esp 496. 3 Bl 125. 5 Co 125 b

Committed (according to the usual division in 3 ways) 1 By words (spoken) 2 By writing. 3. By signs, pictures &c.

Slander by words is of two kinds - 1st by words in themselves actionable. 2 Words not in themselves actionable. but becoming so, by reason of some special damage sustained in consequence of them. 4 Bac 483 - 494.

The action of Slander is an action of trespass on the case founded upon the Equity of the Stat of Westm. 2d - (13 Edw 1st -)

The rules relating to oral slander, apply in gen'l to written (4 Co 14-) but not unwritten - They are to be taken as applying to both kinds - except when the contrary is stated -

I. Of Oral Slander - To render words slanderous in law. falsity & malice must concur in uttering them - (vide def) - Malice in law means not necessarily personal ill will, or ma=

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= evolence, but any wicked or immoral motive. If from ill will to A one should defame B (a wife, child or parent) the words would be maliciously spoken of B (The word malice here has the same meaning as in homicide or murder) —

General Rule - For words in themselves actionable the Pltff may recover, on merely proving the words (same exception page 18-21) no need of proving actual damage or malice. for "damage" is implied - & such words fix = mâ facie import: malice: but this presumption of malice may be rebutted, in some cases, by proving that they were spoken under circumstances, which exclude the inference of malice (Ex. hist. 4 Bac 483 - Bull v. 1 TR 111 arg. do assented to by Ld Mansfield - (as where a former master gives the character of his former servant: this being considered confidential) vide p. 18.

Classes of actionable words - 1st Those which bring the person of whom they are spoken into danger of legal punishment - (Finch's L 185) 2. Tending to exclude him from society - 3. Injuring in his trade or profession - 4. Tending to injure one in his office. E. 3 Bl 123. Finch's L 185 b. 4 Bac 483. 493 -

According to this classification words may be actionable, per se, tho' they do not injure one's moral character - & they may injure his moral reputation & yet not be actionable -

1. Bringing into danger of punishment - if the false words charge a fact, which would incur corporal punishment - the

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words are clearly actionable - Ex. charging treason, felony, Perjury, forgery &c
4 Co 15. 4 Bac 483 &c. Cro J 638. 602-609.
1 Roll 62-6. 49 63-77. 1 Wils 177-186. 4 Co 20
Cro J 114 -

Words spoken which would subject to transportation are actionable - 4 Bac 480
so to casting - 4 Bac 486 - pl 45 - 1 Roll 36 -

Words falsely charging what would subject to im=
=prisonment are actionable - & imprisonment being corporal punishment. 1 Com 179. 1 Roll 46-
C 15 - Sal 694 - 2 Vent 260. 266 - 4 Bac 486-7
Comp 137. Cro C 318. Brick L 185 (Sal 694 contra, sed Denied 4 Bac 487 - 3 Wils 186 -

Held in Conn. that words charging what would subject to a fine, are actionable, or not, as the fact charged is infamous or not - So decided by our Sup. Ct. Qr. Is there any such rule in Eng.? the books are not explicit on this subject - Tho the cases cited below appear to countenance the distinction - 1. To charge with keep=
=ing a bawd house is according to this dis=
=tinction - actionable - Being infamous & finable - 4 BE 168. 4 Bac 487-8 pl 50
55. 60 - Charging a finable offence as positive law. Ex. not performing militia=
=ry duty - not actionable - because not scandalous -

Ech 497. That to charge one with any crime which makes the person spoken of, liable

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to prosecution is actionable (he cites Finch L 186. 4 Bac 487. pl 60) Is not this too general? Suppose a case of mere suspicion charged (4 Bac 485 pl 27 Lid 104 - Cz of Sy - 4 Bac 487 pl 55) which is indictable - Would this be action=able?

Is there any Eng case in which words have been held actionable, under this head, unless the offence charged might be punished cor=porally? -

Words charging what would subject to punish=ment must be actionable, charge a criminal act committed - Charging evil in=tentions not sufficient Lid 573. 1 Roll 52-53. 1 Com 191 - Esh 496. Ez. he gave J.S. counsel to kill me - &c not actionable 4 Co 16 b (Qu - as to this example - Is not such counsel a high misde=meanor?) So "I expect to see him indicted for stealing" not sufficient ~~Holt~~ Fatton 18. It is expres=sive only of an expectation that he will steal

So, "he is in gaol for stealing a horse" not sufficient ~~Holt~~ Fatton 2 - Esh 497 - Qu - For words of a similar import are held sufficient after verdict 2 Wils 303 or 304. Are not these words actionable on demurrer? Semble not - The true meaning of the words are that he is in gaol on a charge of horse stealing - Adjective words under this head are action=able or not as they pre-suppose an act committed or not Ex "Seditious" "Jacobite" "Traitrous" &c not sufficient "Perjured" is suf=ficient Esh 497 - 4 Co 18 b. 19 a

(5). "He is forsworn" not actionable unless it is

added - in a "judicial proceeding" or in such a court - 4 Bac 484 - 4 Co 15. Cro E 609 3 Lev 186 - Without such addition the words are supposed to purport only the breach of some vow, or of a profane extra-judicial oath. See qu - Is this a fair construction? See 2 Comyn R 40 - Where a charge of perjury in a meeting of church-~~wardens~~ members was adjudged actionable - Judge Gould was on the bench & held contra -

To call one a thief after a gen'l pardon is actionable - pardon clears him from legal guilt Esp 497 - Hob 81 - 4 Bac 487 - pl 52 - 3 Co 51b 7 Ray 23 95. So, if the particular theft had been pardoned - suppose the words to be "he stole &c", would these words subject the speaker - they are true & therefore not actionable -

To falsely charging one with having committed a crime of which he has been before acquitted - 4 Bac 487 pl 52 - Owen 150 There is no danger of punishment in fact - But it is sufficient that the crime charged, is one which is of such a nature as to expose to punishment.

If the words charge a crime which it appears could not have been committed, they are not actionable - "He has killed J.S." J. S. being still living - But that supposes - I trust, that J.S. is then known to be living - Esp 498 - 4 Co 18a - Bull 5 or "he killed me" - But this matter must

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be pleaded as Eng^d - cannot be given in Evid=
=ence except in mitigation of Damages -
Bull 5 -

(b) If to words charging a crime, a description
not corresponding to the crime charged, not to
any crime be added. the words are not action=
=able - Ex - calling one a thief because he had
committed a certain act - which amounts on=
=ly to trespass &c 4 Bac 570 - 585 - pl 27-8 - Sid
104 - 1 Roll 51 - Cro J 674 - 4 Co 13 - 14 - 19a Esh 511
517 - Bull 5 - 2 A R 335. Ex "He stole my growing
timber"

But falsely charging a crime for which all pro=
=secution is barred by the statute of limitations
at the time of the words spoken is actionable
(Sup Ct. 1793 - Wolf vs Fitch) The statute is mere
matter of defence to a prosecution - as proof
of innocence would be - Besides it is suf=
=ficient that the fact charged is of such a
nature as exposes to punishment -

If words in themselves actionable - admit of
an innocent meaning, it lies on deft to shew
that they were used in that sense - p. 15. Peak 4 n

When words are claimed to be actionable as
imputing an act, or fact, punishable corpor=
=ally it is a rule that - If the punishment
of the act &c is in the alternative i.e. corpo=
=real or not - according to circumstances
the words are actionable, if the circumstan=
=ces are such, as to require corporal punish=
=ment - Otherwise not - Ex - charging
one with being the father or mother of a

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Bastard which has been chargeable to the Parish; This is actionable - Slide if the child has not been chargeable (vt p 3-) for a putative father &c & not liable to imprisonment, unless the child has been chargeable - 1 Bac 317. Cro C 315 - Sal 694 - 4 Bac 487 pl 57 - 486 - pl 42-3-4 4 Co 17 -

II. Tending to exclude one from society as to charge one falsely of having a contagious dis: = ease Esp 498. 3 Bl 123 - Cr J 144 - 1 Rol 44 - Wolf 219 - 1 Lev 205. 4 Co 17 a 4 Bac 488. 1 Com 184 (7)

But the words to be actionable under this head must charge a present disease. Str 1189 - 2 TR 473. Formerly otherwise Cr E 214. Cr J 430.

Under this head adjective words in the present tense are actionable - 12 Mod 248. 4 Bac 488 Cr J 144 - Ex - "Leprous" -

III. Tending to injure one in his profession or trade 4 Bac 490 - 1 Com 182 - Esp 498. Ex - Falsely calling a Lawyer a knave is action = able - 3 Bl 123 - Finch L 186 - 1 Rol 52 - C 35 - 53 L - 5 - 15 - 52 - 56 - 1 Com 182 - 2 Vent 28. For want of integrity is a disqualification for his profession -

So - "he has revealed his clients secrets" 1 Rol 57 C 50 1 Com 182 - So "he is no Lawyer" no more a Lawyer than the Devil" - 1 Rol 54. 3 Wils 54 Same reason -

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8). To in general words charging a Lawyer with ignorance in his profession - Cro E 382. or 278 Yelv 297. 1 Sid 327. 1 Rol 54 - 4 Bac 491-2 - 1 Com 182 Reason infra

In these cases the Lawyer must state in the declaration, that at the time of the words spoken he was a practising Lawyer - Else no injury is presumed Styles 231 - 4 Bac 491 - 2 Vent 28. Popl 207 See 4 T.R 300 - "False imprisonment p 15" - Proof of plaintiffs acting as a Lawyer is primâ facie sufficient 4 T.R 300 - 2 Mc N. 487 - without record of his admission -

To, falsely calling a trader a bankrupt is actionable (To, "he is a bankruptly knave" -) To, he will be a bankrupt in 2 days. 4 Co 19a 2 Str 962 Esp 499 - 1 Com 183 - 4 Bac 493 - Sid 299 - Cath 330 - 1 Rol 61 - For the latter words tho' in the future tense tend to injure his credit - & therefore his profession or trade, credit being deemed essential to success in trade

To to charge him with cheating his customers & to advise others not to deal with him - 4 Bac 493 - 2 Lev 62 - L^d R 1480 - 1 Com 183 - Burr 1688. It tends to injure him in his calling - For his occupation consists in "buying & selling" -

In actions by tradesmen in these cases, it must appear by laying a colloquium, or, otherwise that the words were published with reference to his trade - 4 Bac 492 - Sal 694 - Str 696 - 1169 - 5 Mod 398. T Ray 61 - 169. Ld Ray 1417 - Ex' "He is a cheat" - "here a colloquium

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= loquium concerning his trade (i.e. an alle=
=gation that in a certain discourse concerning
Pltff's trade, or concerning him as a trader
(p 11)) is necessary to be laid

But if the words were "he is a bankrupt" (Ech
514) it would be sufficient I suppose merely to
aver that he was a trader &c 1 Lev 115. 250
4 Bac 492. 2 Lev 62 (post 12) It implies a
reference to one as a trader - "He is insolvent"
would not - For any man may be insolvent
but no one except a trader can be in strict=
=ness a bankrupt, under the Eng. bankrupt law
If then the latter words were laid a colloquium
would be necessary - "Do not deal with him
he is a cheat" good without a colloquium

Falsely to call a clergyman a liar decided
to be actionable in our Sup Ct. & Ct of (Backus
vs Bisher) Tends to injure him in his pro=
=fession & in Eng to charge a clergyman with
preaching lies is actionable 3 Lev 17. 1 Com 181 -
1 Rol 58. c 36 -

To call him a drunkard - 4 Bac 490 - Alleyn
63 - See Cowp 253 - Str 946 - to other points as
calling him a rogue &c -

To call a Physician a Quack is action=
=able - 1 Roll 54 1 Com 182 To say "he has
killed a patient" said not to be actionable
(Cro E 620) unless it be added "Knowingly" -
"wilfully" or the like - Clinch just contra
Qu - As it supposes ignorance in his profes=
=sion 4 Bac 491 - See 11 Mod 221 - were the same
words said of an apothecary were judged ac=

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= tionable (Rule as to Lawyers supra) —

So, false words tending to injure a mechan=
=ic in his trade are actionable 4 Bac 491
Str 498. They tend to deprive him of customers —

IV — Tending to injure one in his office —
Words charging one in an office of profit —
with want of ability & integrity are actionable
4 Bac 488. Esp 500 — Ld Ray 1296 — 1 Com 180 —
Sal 695. 1 Rol 65. For they tend to impair his
livelihood —

But words charging a person in an office
of trust or honor (not of profit) with want of
ability are not actionable; as they do not in=
=jure his livelihood or moral character —
4 Bac 488. pl 73 — 480 — Sal 695. Seem if they
impeach his integrity Sal 695 Str 617 L^d R
1369. 4 Co 16a Rol 140 —

To call a man a "Bedlehcaded Justice" —
not actionable (Sal 695) not an office of profit

Charging a person in office (in either case)
(11) with inclinations and principles which dis=
=qualify him — is actionable, without charging
any disqualifying act — if the charge of
the disqualifying act would be actionable
(Bull 5) as "He intends to subvert the
government" —

When the words spoken do not of themselves
import to have been spoken with reference

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to pltffs official character, a colloquium is ne=
=cessary - (2d Ray 1369. Str 618 - 4 Bac 489 pl 88.
488. pl 74 - 1 Lev 280) - to shew the reference: As
"in a certain discourse &c concerning the pltffs
office &c - It should be previously stated what
his office &c is - The office of a colloquium is
to explain the reference of the words to some col=
=lateral fact - to which they do not of themselves
expressly refer -

Seems if the words in themselves import a refe=
=rence to pltff's official character - (2 J 557. 1 Lev
280. Ex - He is a knavish justice" - Spoken of
a magistrate - It being alleged that Pltff was
a justice no colloquium is necessary -

So generally, where the words are not actionable
except as they refer to some collateral fact -
to which the words themselves do not upon the
face of them refer; a colloquium is necess=
=ary to shew their reference to the fact! Ex
To say of one who is a trader "he is a cheat" -
5 Mod 308 - 2 Saund 307 - Esh 501 2 Str 1149 -

These words will not support an action without
a colloquium laid, to shew their reference -
"in a certain discourse &c touching the Pltff's
trade &c

(12)

colloquium said by Esh 514. to be necessary when
trader is called a bankrupt - Lev - the pltff
being a trader & this fact being alleged (p 4 Ray
the rule itself supposes) the words I think ne=
=cessarily import a reference to his trade as
no one except a trader can be a bankrupt -
no authority cited by Esh (& see Lev 280) where

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the words were "he is a forsworn justice" - & col = = loquium holden unnecessary. 4 Bac 515 p 55 to (1 Roll 54 - Cro C 270 296) calling a phy = = sician no scholar - 4 Bac 515 pl 55) So (2 Lev 62) saying of a tradesman "do not deal with him he is a cheat" & colloquium not necessary - 2d Ray 1480 - "He is a knave con = = demned &c" - holden not necessary 4 Bac 513 pl 36 - 515 - Cro J 240. Esh 502 - In all these cases however the pltff's trade or office must be alleged -

If the words themselves do not show their own application by designating in express terms the subject matter or the person to which they are applied - innuendo's are necessary Cro Ac (meaning the pltff &c) 4 Co 17 b The office of an innuendo is to explain the application of the words to persons, or subject matter -

Rule "Nothing (no words) which would otherwise remain uncertain (ie to hearer) "can be reduced to certainty by an innuendo" 4 Bac 516 - 4 Co 17 b - More correctly: Anything which taken in connexion with all that passed between the parties to the conversation remaining uncertain to the hearer cannot be made certain by an innuendo - It can make certain only by a reference to something said, or happening before, which is certain - 4 Co 17 b - 1 Rol 73 Comp 684 - Cro - A certain person (meaning the pltff) "killed his neighbor" (meaning 98) there being no other words spoken to identify

the person meant - innuendo bad -
Also, if in a discourse concerning the Plff
the Deft had said "He killed his neighbor" -
Here the innuendo "meaning the plaintiff"
would be good -

An innuendo can therefore never extend the (13)
meaning of the words beyond their proper
import Ex "I S burnt my barn" - (meaning
a barn full of corn) innuendo not
good; if no other fact or circumstance
appears to make it so - But if it had been
averred that Deft had a barn full of corn
& that in a discourse about that barn, the
Deft spoke the above words; innuendo good
Cowp 684 275. Esh 511 - 4 Co 20 a - Cr E 834

So "he stole half an acre of my corn", innuendo
"the corn which grew on half an acre after it
was reaped"; innuendo is bad - Cr E 428. See
1 Roll 52 p 1 - Cowp 684 - For it is inconsistent
with the words -

When an innuendo is unnecessary, a bad
one is surplusage Ex "He was perjured" (In-
-nuendo) in a certain bill exhibited in such
a court" the innuendo is bad, but the declara-
-tion is good without it 4 Bac 516 - 1 Roll 83 - Cro
E 609 - So - "He has forsworn himself" innuendo
"in such a court" - innuendo impertinent -
The words spoken can not bear such a mean-
-ing -

So if the person is uncertain from all the
words spoken; an innuendo cannot make
it certain "One of the servants of S is a thief" -

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innuendo "the pltff" - innuendo is not good Esp 511 - 4 Co 176 1 Sid 52 - Cro E 497 - Hob 245. So "one of you is perjured" - innuendo ("the Pltff") - not good - 4 Bac 514 - pl 38. 1 Roll 81 -

141. It has been holden, that when action is brought for words tending to injure in trade profession &c it must appear in the declaration by express averment, or in express words, that the pltff was at the time of the words spoken of such a trade &c Esp 515. ~~Hob~~ Hutton 49. "That Pltff has been a merchant, trader &c for "many years past" not sufficient Cro E 794 - semb no judt. Cro C 205 Cases contra - 4 Bac 513 - Cro E 273 - Yelv 159 Cro J 222. Cro C 282. 1 Sid 425. & that he shall be presumed from his averment to have been a trader at the time -

The weight of authority seems to be on this side of the question; But the words do not import that strict certainty usually required in the language of pleading -

So in case of a trader that "he gained his living "by buying & selling" - necessary - Esp 515. 1 Sid 299. But the principle I can not require, that "he should have gained his living, exclusively by "buying & selling" -

Words of heat & passion said to be not actionable Esp 520. 4 Bac 522 - 1 Lev 49. 3 BC 185 - Tacitly excluded

Quere - When they import no definite charge

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as "rogue" "rascal" "villain" &c - For these are words of mere vituperation & charge no specific offence (So, perhaps, when wantonly provoked by Plff) Secus - if Deft in a paroxysm of unprovoked anger, utter actionable words - 2 N R 335. (hist 19) -

Construction of words -

Action of Slander anciently rare, words then taken in mitiori sensu - afterwards frequent construed in severiori sensu -

(15)

True if ambiguous words in mitiori sensu be now expressed - They are to be taken in that sense in which they would naturally be understood by the hearers - Esp 511 - 4 Bac 497 - Cowp 688 - 275. 4 Bac 505 - Bac 4 (# 10 Mod 198) Hob 12 Peak Cas 4 (n) 2 Mod 159. 3 Tell N P 1061 - 5 East 463 - #' This volume not considered very good authority - many mistakes)

Where words in themselves actionable, admit of an innocent meaning, it lies on the Deft to shew that they were used in that sense Peak Cas. 4. 2 N R 335. 1 Vin: 507 - 1 John 279 3 do 180 - Hence in such cases enquiry of, how he understood them - Semb - suppose the charge is ironical & so understood - Vide also 2 Camp 514 - & n 37) -

Slanderous words in a foreign language are actionable - if understood by any of the hearers - Secus not - 4 Bac 498. 1 Roll 74 Cro C 865 - Yel 126 -

All the sentences or language used at the time by Deft in immediate connexion

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with the words complained of, is to be taken together (Esh 511). For the subsequent words may explain the former - so as to fall short of slander - As in case of a description added - (h b) 4 Co 19 a Buls 4 2 Mod 159 - "N ascitin a socii" - (tho' the accompanying words need not be stated in the scil.)

16) - Courts will not do violence to Language to find an innocent meaning - Esh 512 Ex "Your husband died of a wound you gave him" - Sufficient though the wound might have been given by accident - Gilb R 243 - Buc 4 -

So, a forced construction not given to make words actionable, which bear prima facie an innocent meaning - Esh 512 "He is a common maintainer of suits" of a Lawyer Hob 117 - For it is his professional business to conduct suits -

General Rule. Words must to be actionable import a direct charge of a slanderous nature, not by inference - Esh 512 - Ex - P.S. got his manor by 'swearing & forswearing' - not actionable 4 Co 15 a 1 - Too general - 2 They do not import any charge upon P.S. might have been by testimony of others - P.S. could not swear in his own case -

Yet where the intent to charge a crime, (or any thing else of which the charge is actionable) is clear the words are actionable, tho' somewhat indirect - Esh 512

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Bul. 4 1 Com 185. "I wile make you an example for a perjured knave" - 1 Roll 49 c 45. ydr 180 -

So, I wile prove that he perjured 3 S 1 Com 185 1 Roll 50 . c 1 - 5 - Cro E 564 . 1 Sid 351 - 1 Vent 276 - (17)

So . When wile you relieve the slaunder you have stolen? actionable 1 Com 181 - 1 Roll 48. 2 do 165 - 12 Co 134 -

Tho' generally actionable words prima facie imply malice; the presumption may by circum=stances, be rebutted - Ex - In case of confiden=tial communications, which exclude the pro=bability of malice - As character of a servant given by a former master, or mistress, on ma=sonable inquiry (p 21) tho' false (i.e. not proved true) malice must be proved - 4 Burr 2422 1 T R 110 - Bull 8. Cro J 91 - 4 Co 91 n. 19 Esp 502 - 3 - 5 Esp 110 + note - 3 Bos 587 - (18) ante 2

Information on such point is useful & impor=tant & ought not to be restrained - In such cases also the facts communicated are presumed to be of a private nature & probably confined to Deft's knowledge - So that it would be difficult to justify if they were true -

So, where one confidentially & by way of warning to another, said of a trader 'he will be a bankrupt soon' the words were held not actionable - tho' special dama=ges were stated - Esp 503 - Bull 8 3 T R 60 - 1 Arg. 30 (19)

The retailing slander fabricated by another

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personally actionable - 6 Co 517. Bull 10 - Tenn if he truly name his author at the time - 12 Co 133 - 4 - 2 W & 400 - 3 Bulst 225. 7 T R 17 2 East 226 3 B & A 005. 4 B & C 24 7 Dist Rep 533 n - 5 Bingham 392 Latt report held con - 1 Law Intelligr 379

But circumstances are carefully to be regarded in such cases, as to the intent, 4 Bac 498. Ex. Where one in the spirit of ~~[illegible]~~ censure said "I have heard that A.S. was hanged for stealing" action lay not 1 Lev 182 - 4 Co 14 - Bull 9. 10 4 Bac 498. Pl 28 -

Deft's suspicion is however no justification 6 Co 518. Cro E 38. tho' it may assist in alle=viating the presumed malice - I should think a man repeating the words of another should be liable: whether he believed them or not - he might truly give his informer who might be a vagabond - Words extorted by pressing or provoking questions by Plff himself, not ac=tionable 4 Bac 498. Pl 29. Cro E 297 - "Dare you say I am perjured" Ans - "Yes, if you will have it" - (Pl 141) -

Justification.

(21) The truth of the words is always a complete justification - 4 Bac 516 - 1 Roll 87 - (Bull 8. 9 cited contra) For words to be slanderous - must be false -

So, the Deft may sometimes justify tho' the words are in themselves actionable & false or rather false & of an actionable kind & where false words are published in a course of justice - Ex in declaration or count

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4 Bac 499 - 518. 1 Com 194 - 6 Eh 503 - 4 Co 14 - Co E 230 - 248. Hob 82 - Hutt 113 - 1 Rolle 43 - 3 Leon 138. 163 - Cy 285. Or in articles of the peace otherwise it would be dangerous to prefer com = plaints to courts of justice (& see 3 Eh 32 for words used in giving charge of another to an officer, or a complaint for a crime -) (Action for malicious prosecut.n may lie)

But it has been holden if pltff charges crimes not cognizable by the jurisdiction to which the action lies by him - not justified Eh 503 4 Co 14 - 1 C Co E 230 - 248. Hob 267 - 268 - 1 Rolle 34 - 1 Com 194 - Sea 410 2 Lutw 1571 - 1 Hawk B 1 - C 73 § 8 - 1 Saund 132 n 1 - Cro J 432 - 5 Eh 109 - 110 a contra The rule seems not to be Law (See Mal = icious Prosecution) p 23 - I E. thinks ma = licious prosecution is the proper remedy -

So, the person charged in articles of com = = plaint (tho' they were exhibited under oath) may justify saying that the complainant has sworn falsely For this is in his defence in a court of justice - 4 Bac 499 - 518. 1 Rolle 87 2 Burr 807 -

So, a party to a suit may say that a witness 122
is perjured by way of objection to his ad = = mission ! 1 Com 194 - 1 Bulst 33 - 1 Saund 132 - n. 1 - 3 Leon 138. 163 - 1 Rolle 87 - If his objection is false not liable -

Words used in a complaint to a grand jur = = or, or proper magistrate or in an in = = dictment are not actionable - 4 Bac 499 Co E 147 - 3 Leon 138. 4 Co 14 Hob 82 - 3 Eh 32 - Seems, no one could safely complain of an offence

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So, if words used in petition to Legislature for redrs of grievances, delivered to the members only 2 Saund 131. 2 Burr 810-11. 5 Esp 110 n. This is to preserve the great legislative privi=lege of petitioning.

So of words used by way of defence, by a person accused before a Church presbytery. 5 Esp 110 n. 1 Binney 178.

So of words used in pronouncing the sentence of a Court Martial. Ex that the charges were false, malicious & groundless. not liable 2 N R 341.

23). Tho' if one falsely, maliciously & without probable cause. exhibits a complaint &c. action for malicious prosecution will lie (4 Bac 500 "Malicious Prosecution". but not an action of slander.

So in general in the above cases of complaint or prosecution, if the cause of justice is made a mere cloak for malice. action for malicious prosecution lies. Scmb. 4 Bac 500. 3 Bl 126. Finch L 305. F N B 116. (not as to Grand jurors) 17 R 508.

So slanderous words spoken by witness in Court are regularly not actionable. 4 Bac 499. 518. Cro E 230. 2 Bulst 269. Hutt 11. Seems if he goes beyond the offence & slanders a 3d person. Esp 504. 4 Co 14. Suppose he so slanders a party. Is there no remedy? The books are silent on this point. I see no

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reason why he should not be liable as well as when he slanders a 3° person –

To subject a witness whenever he can not verify his testimony by other witnesses, would be both unjust & impolitic – no one would dare to testify to a criminal charge –

So, if one witness in testifying charges another with having testified falsely, no action lies – Esh 505. 518. 1 Saund 131 – 4 Bac 518. 1 Com 194 Burr 807 – 2 Bulst 269 – Hutt 11 – Cro E 230 5 Esh 110. n –
It is only supporting his own testimony – or a mode of asserting it to be true –

So, that the words charged were spoken by deft, as counsel in a cause, is in some cases a good defence, or justification – in some not so; 4 Bac 498. 518. Bull 10. Cro J 91 5 Esh 110 n Rule. When the words (the false &c) are pertinent to the cause (& suggested by his client) he is not liable – Esh 517. 1 Com 194 – 4 Bac 489. 518. Cro J 90. 3 Bl 29 – 1 Holt's N.P. 621 – Is the client's suggestion at all important? 1 Roll 33-87. Esp 10 517. Bull 10.
But if the words are impertinent (tho' suggested by client) action lies – 3 Bl 29. Cro J 90-1 So as seems implied in 3 Bl 29.) If the words tho' pertinent are slanderous & not suggested by the Client – Qu Is this correct? –

Most of the books however make no difference between their being suggested or & not suggested Bull 10 – Esh 517. 1 Roll 87. c 25 –

over

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1 Com. 194 - 1 Roll 33 C 20 -

Does that circumstance affect the reason of the case, when by the supposition, they are impertinent - How can counsel be justified in impertinent accusations by any one's suggestions or directions?

It has been decided that for the purpose of mitigating damages, in favor of a client an advocate may use slanderous words not pertinent &c - 4 Bac 498. Hob 328. 1 Rol 87 - C 10 Ln -

25) In a subsequent case (Style 462 4 Bac 498) holden that an advocate is never liable for slanderous words in defending his clients cause; It is his duty - presumed that he was influenced by client (Late writers do not maintain the last two cases) Ln - is the rule founded upon any principle? -

Pleadings -

In declaring it is usual to state "falsely, maliciously &c" "maliciously" it is said is not necessary # (1 Com 194 - 1 Saund 242 a Noy 35 4 Bac 512 pl 8. 1 Hut 273 Carm 57) if the words are in themselves actionable; for malice is primâ facie implied (ie such words if false prove or imply malice - primâ facie at least the fact of malice; But should not the fact itself be alleged? (as in murder) for the words do not necessarily imply it, as a feoffment does livery &c) Serjeant Wms - Seems however to consider the rule as Law -

Slander

Pleading -

1 Saund 242 a (n) sed qu still? - A direct averment that the words are false - not necessary "Falsely published" are sufficient - Esp 516 - Bull 8. (# It has been holden that the omission of - "maliciously" was not fatal after verdict sed qu) -

Declaration usually states that the pltff is of good fame, name & reputation &c (1 Com 195 not necessary in any case - The Law presumes every man is of the above character till the contrary appear -

Alleging that the words were spoken "open & publicly" sufficient without saying - "in the hearing" &c - &c" in the presence of divers persons" is sufficient - 4 Bac 512 - Cro E 861 - 486 - Noy 57 - & is usually put in -

When there are two counts one charging actionable words - the other words not actionable* - & on a plea to the whole - entire damages are given, judgment will be arrested & venire de novo awarded - 8 TR 564 - Secus if the words are all in one count (10 Co 130 - 3 Wils 137 - Cro E 320 - 788. Str 1094 - 1 TR 508 - 532 - See 1 TR 532 - (ie laid to have been spoken at one time, Bul 8. 2 Bac 7. Rost 346 - 432 - 10 Co 31 - The first of these rules has been rejected in Connt. - 1 Connt. R 324 Coleman vs Wolcott (on indictment for libel the first rule does not hold.) (* good on demurrer) Vid 2 Bay 204 - 439. 1 Wend & Mump 361 - Sed qu. Q. G - "Pleading P. 9" 533-4 -

In actions for words not in themselves actionable special damage must be stated this is the gist Esp 520 8 TR 130 - Bull 6.7 And without proving it there can be no recovery -

Slander

Pleading -

Ex - Saying of a farmer that he is insolvent - or a knave & this depriving him of a beneficial contract -

So where the words are actionable - the Pltff may state & prove special damage - but in this case he can prove no other special damage than that which is stated specially - Bull 7. Esp 520 - 8 TR 133 - 1 Rol 58.

(26) What amounts to an allegation of special damage Str 666 - Bull 7. Keil 65 290 - 8 TR 130 1 Rol 58. Sid 396 - 1 Vent 4 - Cro J 499 -

But where the words are not in themselves actionable holden that special damage might be proved under a general averment of damage Str 666 - 1 Com 198. Qu by Buller J 7 - Keil 290 Esp 520 - not Law. Scott - The true rule appears to be that no special damage can be proved, in any case unless specially laid -

Immaterial what the false words were - if they are malicious & occasion special damage - calling a single woman incontinent by which she loses a match - 4 Bac 496 - 4 Co 17 - Saying of a servant that he is dishonest - unfaithful - incompetent - or that a Lawyer is insolvent &c

In case of slandering a title (as it is called) as calling an heir apparent a bastard - it is sufficient to show remote or probable damage - Esp 501 - Cro J 213 - 4 Co 17 - 4 Bac 494 - 1 Rol 38. Ex - Pltff's father or ancestor had disinherited a design to disinherit - sufficient

Slander

Pleadings

also that the words tend to disinherit. 4 Co 17 a. Esh 501. So decided in favor of young=
=est son tho' not heir apparent. But no action lies if Deft claim to be next heir - the words are then only in assertion of his own claim - 4 Co 17. Esh 501.

General Issue - is "Not Guilty"

The general issue is a denial either that Deft spoke the words - or that they are not actionable for want of malice - As in the case of confidential communications supra p 18. 1 TR 110. Bull 8. Esh 503-517 - 1 Lev 82 ie - either or both these facts may be denied under the gen'l issue -

In Conn't the gen'l issue includes all de=
=fences (even that the words were true or otherwise justifiable) except such as arise from some act of the Plff - amounting to a discharge But by rule of S Ct notice of justification must be given - (same Rule in N Y — but he must give notice that his defence is that the words were true or)

The gen'l character as to the species of crime (not as to any other species of crime) charged by the words may in Conn't be proved in mi=
=tigation of damages - 1 Root 354-450 (no such gen'l rule till lately at least in Eng'd. Lemb 10 Hill 140 6 Mass R 518. 1 John 46 - But it seems of late that the Con't rule is adopted in Eng'd. 1 Maul & Selw 284. 2 Camp 257. Peak Ev Appx 92. acc Parker & Swan 284 - C C Ct U. S. Sept 1820. perjury charged - Plff's gen'l character in point of probity & veracity unimeached -

Slander -

Gen'l Issue -

But other particular acts of the same kind, cannot be proved - when the charge is of particular acts Atwood vs Atwood 5 C.t. Aug 1807. See Bull - 296 - Peak Ev 276 - Tho' altho if the words charged are vs Plff general character for if called a thief any particular theft may be proved -

In Eng.d a special justification can not even be given in evidence under the Gen'l Issue (In C.t. can always by the Stat. of Pleading) Est 518. 62 - that the words were true 4 Co 16-5" 125. Str 1200 - Dany 373 - Inconsistent with the plea -

In Eng.d the truth of the words cannot be given in evidence under the gen'l issue even in mitigation of damages Str 1200 - Est 518. Bull 9. do 8. case cited contra - Qer - Is it not admissible in principle? See analogy " Assault & Battery 15" -

27. One recovery of damages is a bar to another action for the same words - whether the words are actionable per se, or not - Est 519. Bull 7 - No subsequent action will lie even for subsequent damages

Formerly necessary to prove the words precisely as laid - now sufficient to prove substance Bull 5. 2 Roll 718. Est 520. 4 TR 217 8 do 150 - 62 The persons of pronouns must not be confounded as "he" for "you" -

In action of slander in gen'l, Plff after proving the words stated, may give evidence of other words of a similar kind, spoken at another time even after the action brought

Slander.

Gen'l Issue.

- said to be in aggravation of damages - Est 518. Bull 10. Case cited (It may have that effect see vide infra)

But damages cannot surely be recovered for such words I. I. Words not actionable may be thus proved - II. Words actionable #. (Which also may be thus proved) are a foundation for a distinct action Phill Ev 134-5. Peak C 22. 74- 1 Camp 47. 2 do 73 ff # The distinction formerly taken viz that the words not actionable might be thus proved - actionable words could not - is now exploded - Phill Ev 134-5. 1 Camp 49. & cases sup -

III. Words spoken after action brought may be thus proved; the wrong done by these words did not exist, when the right of action accrued -

The same rule holds as to proving other libels to shew malice - Phill Ev 134 - Peak 74. 166. 2 Selw 938. The real object then must be, not to recover damages for the words not laid in the declaration, but to shew malice - actual malice in Deft - Bull 7. Est 520. Sti 691 - Tho' they may thus consequently, have the effect of aggravating damages for the words laid -

But when words, spoken at another time, are given in evidence under this rule, Deft may prove them true - to rebut the inference of malice Est 518. Bull 10 - (28)

But words not stated, & spoken at a different time must to be admissible, be similar to those charged. Est 520 (said "the same words" only,

Slander.

Gen'l Plac.

Bull 10. Ech 518.) i.e. words which affect Pltff's cha= =racter in the same point, or in the same respect as the words said - Ex both impeaching his integrity - or his conduct in office &c —

English statute of limitations as to slander &c two years from the time of uttering it - Stat extends in construction only to actionable words (Ech 519. 1 Sid 95) for in case of words not actionable the special damage might not ac= =crue till after that time, yet the words of the statute are "Within two years after the words have been spoken" — (Here within 3 years) —

(29.) Generally a joint action of slander by or vs two will not lie - 2 Burr 984 - Ech 504. Bull 5. 1 Com 195. Ex 19 a 4 Bac 511 - Yelv 120-1 - Not a tort which supposes an act: of course no joint wrong #. (Bull 5. 3 Bl 117. vide 1 Com) Ergo lies not vs two - And the right viola= =ted cannot be joint: Ergo it lies not by two (the Husband & Wife must join) —
(Secus of libel (p 36) malicious prosecution 39-40)

But two parties in trade may sue jointly for words spoken of them, as such, where special damage is sustained by the firm 3 Bos 150-2. Yelv 1162. 2 Saund 117. a n. Yelv 129 n - Here a joint right or interest is vi= =olated - damage joint -

Suppose the words actionable in themselves & no special damage alleged - & qu. if Williams Serjeant thinks the action would lie 2 Saund 117 a - n - & why not? actual da= mage would be joint - "Damage implied or pre=

Slander

Gen'l Prac.

= Remed would therefore, seem to be as -

II. Slander by writing or libel — (30) -

As to the nature of slander by writing, or libel - Whatever words would be actionable if spoken - are clearly so when written Esp 504. 3 BL 126 -

But written slander is a more aggravated injury, as having a more extended circulation being more permanent + being always deliberately committed - 3 Bac 490. 3 BL 126 - made a matter of record in popular language -

Hence the rule does not hold always a converse (post) the Esp 504 says it differs from slander by words in this only - that it is delivered in writing or print - See also 3 BL 126 -

But this is incorrect words written are in many cases actionable when if spoken they would not be

Definition of a Libel -

Any malicious defamation of a person (living or dead) made public by writing &c + tending to excite resentment in the object of it, or to expose him to punishment, odium, contempt or ridicule - 4 TR 128. 1 Hors 193 - 352 - 4 BL 150 3 BL 4 - Bac 490 Definition seems to have been formed with reference chiefly to libels considered as public offences - Ex dead person - exciting resentment - (p 35) — (31)

For libels in general 2 remedies - by indictment or criminal prosecution + by civil action -

Slander.

Libel -

3 Bl 125. 3 Bac 492. 498. Title Libel - But when a libel is upon the memory of the dead - no civil action lies -

Said the pen'l rule relating to oral slander applied to cases of libels, considered as civil injuries: This is true so far as respects the affirmative rules, describing actionable words - As that written words falling within the description of any of the four classes of actionable - are libellous - Ex - Words charging an offence which would expose the object of them to punishment - Esp 504 - 3 Wils 403 - Str 898. 3 Bl 126 - But the negative rules as to the actionable quality of words spoken, do not always apply to words written

But nothing in pen'l is construed a libel which is necessary in the regular course of legal proceeding - Ex - In a declaration, complaint, affidavit &c as in case of words spoken - Est 505. 2 Burr 807. page 21 &c -

(32) - Action lies not for publishing a true account of a trial in a court of justice - tho' pltff character is injured by it - 1 Bos & Pl 525. 5 East R 110 n - 1 do 456 - 8 TR 293 - Court order the reporter sometimes not to report the case before it is decided because it may influence public opinion - In a civil action, the truth of a libel as of words not written is a justification - 1 TR 748. 4 Bl 150 - 4 - 3 do 125 - 6 - 7 East 253 - 2 Mod 166 - 10 do 99 - Bull 8 - 9 - contra 4 Bac 516 - 3 do 495 - S. C -

Secus, on a criminal prosecution at Com. Law 3 Bl 125 - 6 - 4 Bl 150 - Str 498. 5 Co 125. Tho' falsity

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Slander:

aggravates the guilt 4 Bac 150. ~~Sir 497. 5 Co 125~~ -
2 Mc. N 648. Nor is the bad reputation of the per=
=son libelled a justification 2 Mc N 649. 7 Mod 4
For its tendency to a breach of the peace is what
renders it a crime The object of the prosecution
is not reparation for a civil injury, but punish=
=ment for endangering the public peace, when
the attack is upon private character is not the
rule reasonable, tho' on when upon a public
character, Truth of the words is a justification
under our statute Stu C 355 and in N Y -

It is essential to the constitution of a libel that
it be published - The modes of publication
are various - 2 Mc N 643 Writing it originally
seems to be sufficient tho' dictated by a 3d person
Esp 510. Carth 405. 5 Mod 103 - 2 Mc N 642 -
This being the essential part of the making of
a libel

But merely transcribing it without shewing it 33
to any one, is not a publication - Esp 570. 9 Co 59 a
but it is evidence of a publication if the libel
be made public - Sal 419 -

But composing it - procuring it to be composed
reading it to others after one knows the contents
delivering or shewing it to others after one knows to
- sending it in a letter to a 3d person - fixing it
in a public place, amount to a publication in
Law

For to be wilfully or wrongfully instrument=
=al in making it public, is to incur the
guilt of actual publication - Esp 570 - 9 Co
59 b 5 Co 125 b 3 Bac 497 - 1 Hawk 195 - 2 Mc N

Slander.

643- Ld Raym. 341- Sal 408. 2 Bl R 1038. Ld R 417- 480- So that many may be respect= =ively liable for one ~~little~~ libel -

The sale of a libel in the shop of a book= =seller, or other is primâ facie evidence of wilful publication by him - Ones on the bookseller 2 Mc N 644- Burr 306 3 Bac 497- 12 Vinc 229 - Ezk 510- 5 Burr 2687- So of a sale by bookseller's servant 2 Mc N 644-5. It is prima facie evidence of publication by master -

So of printing by servant is primâ facie evid= =ence as above - 2 Mc N 643- 2 Bl R 1038. A journeyman is a servant for this purpose -

But this presumption may in all cases be rebutted: As that the sale or printing was no master's orders, or clandestinely without his know= =ledge - that he was delirious or sick & unable to attend to his business - that he was absent - 2 Mc N 648 - 2 Hawk 131- Imprison= =ment is prima facie & sufficient excuse for the master - 2 Mc N 648. Servant also liable - command of the master can not excuse a tort; bound to obey only lawful commands - 2 Mc N 647-8. Ignorance of the contents how far an excuse see 2 Mc N 649 -

So sending it to the press for publication is a publication in Law - & the person sending is guilty of publishing where it is printed Fost 201- Ezk 510. For it is published by his pro= =curement or instrumentality; & "qui facit per alium, facit per se" -

Transcript.

Libel -

Singing it in the presence of others, is a pub= (374)
= lication - Esp 510. 5 Co 125 b - 5 Burr 2680. 2 Burr 807 -

But repeating part of a libel in merriment without malice has been holden no publication Esp 510. Mio 627 - 813. 1 Hawk 196. 2 Mc N 643. But the absence of malice ought to be very clear -

Writing it to the person who is the object of it, is sufficient publication for a public prosecution as it tends to a breach of the peace - Esp 506 - 510. 4 Bl 150. 1 Hawk 195. 3 Bac 497. Popk 139 - Not so for a civil action Hob 62 - 215. 12 Co 35 1 Mod 58. as thus sending it is not a communi= = cation of it to others -

And of course no injury to the reputation of the person to whom it relates -

If the letter was a friendly expostulation by a person having a right to expostulate - is it suf= = ficient for a public prosecution? Esp 506 - Clearly not actionable - It & 2 Brownl 151. & I should think not indictable

Are all libels which support a public prosecution actionable? 3 Bl 125 - 3 Bac 492. So it would seem from some opinions; but it can not be universal= = ly so - as when written of a dead person - or ad= = dressed & communicated only to the person to whom the words apply -

Words written are many times actionable, when (35 -)
if spoken they would not be - 2 H Bl 592. arg.do 1 Bos or 331 - 1 Saund 120 - 1 Show 313 - 1 Mod 58. 1 Ld 752 arg.do Str 899. 3 Bac 492. (ante 31) -

Slander.

Libel -

Not only the classes of actionable words, already enumerated (p 2) are li= =bellous when written & published, But writ= =ing & publishing any thing falsely, which makes a man odious, or ridiculous # is actionable 3 Bac 492. 2 Wils 403. 1 Bos & Pul 331. So (2 Wils 414) to Gould Justice "Rogue" or "Rascal" is sufficient # qu if it tends to ridicule only -

So, disturbing domestic peace &c (said by Esp 505) Qu. to maintain a civil action? -

Writing or printing of one that he is a swind= =ler, is actionable - 1 T R 748. Seem if spoken 2 H Bl 531 -

The offence or injury of a libel are considered as repeated, or rather continued in every stage of its circulation - Therefore venue not changed in Eng? 1 T. R 570. 647 - 1 Wils 178. If the action brought in any county, where it has circulated -

It is not indispensable to the constitution of a libel that the libellous words should be so direct & explicit that any reader will understand its application - sufficient if understood by any body -

(136) - Tho the writing only expresses - the initials, or one or two letters of the name of the person to whom it is intended - or feigned names; it is a libel if the manner is such as clearly to identify the person 3 Bac 493 - 1 Hawk 194 - Esp 506. 2 Atk 470 -

Slander -

Libel -

Action or indictment for libel will lie as several joint Defts - for the publication is an act, in which two or more may join - Bull 5 Burr 984 -

But for words spoken they can not --

If one writes a libel - another gets it printed - ~~the~~ one that prints; ~~one~~ reads it - & another ~~sing~~ sings it - each of these are guilty of pub= = lication - & liable to an action, for publica= = tion is the essential part of a libel (Vide last of page 32)

On indictment for libel, if the jury find the fact of publication & the innuendos; they are bound according to the Com. Law rule to find Deft guilty - They have then nothing to do with the question of actual malice, or whether the matter is libellous - These are facts of Law arising upon the face of the Record - Whether libellous, or not appears from the gen'l verdict; for as the libellous matter appears specially stated (for the libel must be stated in the very words in which it was written) upon the record: a general verdict of guilty in case of libel is equivalent to a special one, in any other -

As a special verdict on an indictment for murder - And if the matter is libellous ma= = lice is implied - 3 TR 428. Sal 417. 5 Burr 2608 2 Mc N 551 -

Suppose then the Deft actually published; but that he had sufficient excuse; as insanity In such cases the jury should not find the publication - So the Court would direct: For the act is not criminal -

Slander.

Libel -

In this country a different rule prevails - the jury are at liberty to judge of the Law - as well as the fact under the direction of the court - as in all other criminal cases - So now in Eng.d by Stat. 32 Geo 3.d 2 Ac St 651 -

(37) - III. Slander without words - or Libel without writing - Slander of this kind consists in emblematical representations As pictures, signs effigies &c Ex - raising a gallows before one's door & hanging him in effigy - Ed 511 - 5 Co 125 - 8.
Erecting a lamp before another's house & lighting it in the day time (it means a Lewd house) 11 East 226 -
So. I conclude, painting a duck upon a physicians door -

Representing one ignominiously by painting &c 3 Bac 491 - Ex - painting one's likeness with Apo's ears - or in the act of perpetrating a crime, or in any scandalous or ridiculous act or situation - in such cases the application must be made out by innuendos & averments -

In declaring for this species of slander it is said special damage must always be shown not actionable in itself - Ed 511 - 3 Bl 125 - 6 - Otherwise it is said the import & application of it are not made sufficiently certain - Sed qu. For the declarations of the spectators are evidence of the identity of the party libelled - 2 Camp 514 (p 15)

Slander.

By our Statute, common slander is punishable as a public offence (St Conn. 220) fine not exceeding $34 - to county treasurer - & never inflicted -
Judge Gould has no doubt slander by writing would be actionable - the Declaration should state the mode (i.e. the act) by which they convey their ideas —

8

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The action of Trover originally lay only in cases where one found the goods of another & refused to deliver on demand but converted them to his own use. Hence called Trover & Conversion – Hence also averment "in finding" 3 Bl 152 – 5 Bac 256. It now lies in many other cases – (49)

It is now an action on the case (or strictly of Trespass on the case) Derived from Stat. Westm. 2d. 13 Edw 1 – 3 Reve 74 & 78 & 2 Ro 202. 389. 391 –

It now lies by fiction to any one who tortiously takes the goods of another – 5 Bac 257. Cro C 524 – Cro J 50 (but see) Esp 589 – Mod 31 – Str 128. (Formerly not so) In this case the "force & arms" are waived in point of form otherwise an action on the case would not lie

And in general in all cases in which one who is by any means possessed of another's personal goods tells them or wrongfully refuses to restore them on demand – 3 Bl 153 – Bull 33 – Cro E 781 – 5 Bac 256 –

The first instance of this action in its present form was in the reign of Edw VI. But actions of a similar nature had been brought in the reign of Hen VIII – 4 Reve 74. E.2 526 – 385-6. (50)

The fact of finding is now immaterial, conversion is the point – Finding generally stated, but not always in Eng: or here – not indispensable – Esp 587 – Bull 33 5 Bac 275. 2 Bulstr 313 – For the manner of obtaining possession is now set in declaration (Esp 587. Bull 33) "finding" not necessary of course as mere inducement more ? L.E – It can not be specially denied by a traverse, but Deft may deny under the general

issue, that he ever had possession, of the goods by "finding" or otherwise.

It lies in all cases in which detinue lies, & in many others. But it has almost superseded detinue, as the ofs certainly desired in describing it "freedom from wager of Law - 3 Bl 153.
General definition of Conversion - 'A wrongful assuming to dispose of the goods of another as if they were one's own. 6 Mod 212. 5 Bac 257-8. 2 Bulst 280. 1 Sid 264. Ex. vi termini - therefore it is tortious & always consists in a misfeasance. And a mere non feasance is never a conversion. Therefore a conversion does never admit of a justification in pleading - as conversion must be unlawful.

The deft is by the form of the action always supposed to have gained possession lawfully. But the action lies as well (at supra) when the original possession was tortious (5 Bac 256-7. Cro J 50. 1 Burr 31.) as where lawful: the first being conversion: and this may consist either I. In an unlawful taking -
II. In an unlawful use -
III. In an unlawful detainer -
The evidence of conversion in these cases, is different Esp 590. 5 Bac 288. or 268. 269. Sal 655. infra 5 Bac 257. 1 Roll 1. These acts are respectively "a wrongful assuming" &c. as above. The mode of proving conversion varies to correspond to the three kinds of conversion.

5. I. A tortious taking is itself a conversion in Law. Esp 589. 5 Bac 257. 1 Sid 264. 2 Str 465.

Trover

to demand necessary - Ech 500. 3 Wils 146. Trespass concurrent in such cases - 5 Burr 2657. 2 Str 943 - Trespass is founded on the force, as well in point of form as in fact - Trover waives it - i.e. waives it as such - but is still founded upon it as a conversion, In other words waives it quoad the form of declaring; but is founded upon it in evidence - 1 Burr 31 (60 b) -

II. By unlawful use - this supposes Deft's possession lawful: Ex using a thing found - bailed - &c - 5 Bac 257. 1 Com 221 - Cro E 219 - For this is a wrongful assuming to dispose &c 5 Bac 257 -

When the taking is not tortious there must be some evidence of an actual conversion as in the following Examples - Ech 580.

Mis using a thing entrusted to one's care, found &c is an unlawful user; & so a conversion 1 Com 221. Ex - A carrier of a box of goods - breaks it open 2 Lat 655. 2 Bulst 312 - 2 JR 753 arg.do Same with finder of goods, -

So - destroying them, as throwing paper found into the water - Cro E 219 - 3 BL 153 -

So by selling them - Bulk 131 - Cro J 419. 2 JR 144. 1 do 387 - 6 do 697 - It is "a wrongful assuming &c" -

But if the bailee of goods or destroy them, this = (52)
= psp is concurrent with Trover - Co Lit 57 a - 5 Co 13 b - 2 Roll 555. 5 Com 581 - Mod 248. - Bailment is extinguished by so wanton an act (see Bailment) according to Co-Lt it shews

original intent to destroy them, & (I conclude) renders his possession tortious - ab initio - (vide Trespass on things personal p 57 - In other words it renders his original possession tortious (cont) -

Drawing part of a cask of wine & filling it with water, is a conversion of the whole - Ech 581 - 1 Com 221 - Str 596 - This is a wrong=ful assuming &c -

But negligent custody of a thing is not un=lawful use - Ech 580. 1 - 590. not a mis=feasance (supra) Hob 281. 8 Co 146 - So no conversion - Ex. finder of cloth suppos it to be moth-eaten - So if perishable articles are suffered to be spoiled - for want of care Cro E 219 - says an action will not lie for neg=ligent keeping - wrong Ld Raym 919 - 1 Bac 48. See 1 Bow C 252 - Jones 48. Ld Raym 917 - 5 Bac 258. Hob 19. Sal 655. 143 - 1 Roll 2. 6 - C 5. 5 Bac 282 - 1 Bac 243 - 5 Bac 269 - Special action on the case lies in cases of this kind - Ech 590. Sal 655. L^d R 917 - 1 Bow C 252. Jones 48 Ech 581 -

If carrier loses the goods trover lies not - Sal 655 - 143 &c ut sup. No misfeasance - When liable for loss by neglect - misfortune or act of a stranger - the remedy is by spe=cial action on the case - detinue being disused -

No timber being on B's land, A asked leave to take it - B refused - B was holden not

guilty of a conversion - no intermeddling, no misfeasance - 5 Bac 259 - 29 - 2 Burr 318. 2 Mod 245 - See 5 Bac 178. 4 - 2 M & C 257 - 8. (Battery 6) Could A have been justified, in entering on his land to take the timber without B's leave? & when A's fruit falls on B's land - Vide Ry. gu. cl. fry -)

If conversion consists in selling the property of another: Indebi: is concurrent - Bull 131 - Cro 419 - 2 Str 144 - 1 do 387 - 8 do 697 - To recover the money it sold for - The action is for money had & re - If then there is an unlawful taking - & subsequent sale by the wrongdoer; the owner may have trespass trover or Ind. Asp. at his election - But one recovery bars any subsequent action in either of the other forms - Assumpsit lies not before the price is received -

(53) -

III. Unlawful detainer is a conversion, as if the Deft. bailee, finder &c wrongfully refuses to deliver on demand; If indeed there has been an actual conversion as by using, selling, detaining &c - a demand & refusal are not necessary to a right of action - tho' the possession was lawful - Esp 589. go. Tide 264 -

For there is then conversion without demand, a conversion by unlawful use, of course the cause of action is complete - But when Deft has been guilty of neither an unlawful taking - nor of unlawful use - There is no right of action till plaintiff has demanded the property & Deft has wrongfully refused to redelivr it -

Trover -

But a refusal to deliver on demand is not of itself a conversion or unlawful detainer for it may be justifiable - Ex - Suppose not suf= = ficient evidence of ownership - accompanying the demand - Esh 590. 2 Bulst 312 - Cowp 529 And it is for the jury under the direction of the court to decide - whether the evidence was sufficient -

So Deft may have had a lien on the pro= = perty: as an Bailee, a carrier &c 2 Show 161 - 2 Ld R. 752. Esh 582. Burr 936 - 2221-2 So it may have been destroyed without Deft's fault - or so lost - or stolen —
Sal 655. Esh 590. Burr 2827. Ld Raym 752 -

A demand & refusal therefore are only evid= = ence of conversion, or unlawful detainer Esh 590. 1 Roll 131 - 5 Co 50 3 Bl 153 - 2 Show 179 - Mod 187 - & per se only prima facie evidence # - 10 Co 56 b 57 a Esh 590 - 3 Burr 1283. 2 H Bl 135-6 - # Denied in 6 Mod 112 & said to be conversion - Mod 400 See Cowp 529 -

But if the refusal is not justified by Law, the presumption becomes conclusive evidence to the jury of conversion - for in such case the detainer is of course unlawful -

(154) - A finder of goods has no Lien on them at Com. Law. for his expence & trouble - 2 H Bl 254 - 2 Bl R 1117 - & therefore cannot justify a detainer under such claim - - of course liable in this action, after a demand if he detains for this cause -

* But if the Jury find only that Pltff was owner & Deft in poss.n & demand & refusal (not finding a conversion) Ct. cannot give judgm.t for Pltff. for the jury find only prima facie evidence of conversion 1 Co 5 b. Esp 590. Cro El 97. 495. Burr 1243. Hardr 48.
This would be a special finding but a venire de novo would be awarded.

* If A's timber floats on B's land, A cannot maintain trover v. B even after demand & refusal. 2 H Bl 257 g 5 Bac 259. 12 Mod 248. 2 Bulst 310. But A may enter & take the timber –

Trover.

(Bailment 36). Is not the finder's case in the nature of a voluntary courtesy? — Qu. Can he recover? J. G. thinks not - no decision on this point -

If one having the goods of another puts them into the hands of a third person wth the command of the owner; this is conversion — Esp 581 - 4 T R 260 - Servant is liable for conversion by himself tho' to the use of his master - or even by masters order - Esp 580-6 - 1 Wils 328. Str 813. 1 Com 221 - Bull 17 - quod vide 2 Mod 242 - For masters command justifies no other than lawful acts done by the Servt. (Master & Servant) — ×

Who may maintain Trover.

In general any one who has an interest in goods converted by another may maintain the action. Ex - any & every bailee - (55)

It is not necessary for Pltff to have absolute ownership of the thing Ex. Bailor may maintain the action by a third person he having the general property -
5 Bac 261 - 2 Roll 569 - 1 Sid 438. Latch 254 ("Bailment" 102-3) — (post) - But this rule does not hold unless he had the right of possession at the time of the conversion - (either the possession or the right of present possession suffices) It is said however he may have case wth the wrongdoer for injuries done while the exclusive right of possession is in bailee - 1 Ch Pl 167. 2 Phill Ev 133-4 - 3 Esp 209 - 359-60 - 8 Johns 432 - 11 do 385. 2 Ch Pl 239 n (i.e. a special action on the case for injury done to his reversionary interest) 7 T R 9 - 4 do 489. 1 do 480 - 8 John 432 "Bailment 103. "Trell" 52 - 3 Esp 140.

So bailee having special property may main-

= tain the action as a stranger - 1 Bos & Pul 44 - Peak 40 - 3 Esp 140. 1 Com Dig 218. 1 Roll 4 - C 52 as a common carrier - a special carrier - agist= = ing farmer &c 5 Bac 165 - 262 Mod 545 - Sal 143 Esp 577 - 1 Mod 31 - So, I conceive of every class of bailees: For as against strangers they are the own= ers - Special property is sufficient - "Bailm.t" 108

If goods are sent by A to B not to vest in B but to answer a particular purpose for A & the purpose fails. A may have Trover for them after demand & refusal - 1 5 TR 215. 495 -

(56) - So a Sheriff who has taken goods in execution may maintain it as any one who has wrong= = fully taken them away. 1 Lev 282 - Ball 33 2 Saund. 47 note -

So Lessee for years of a house blown down may have Trover for the timber as a stranger - Ball 33 Esp 577 - "Bailm.t" 108. He has a special pro= = perty in it - from his rightful possession -

So a Lawful possession alone or possession acquired under the claim of right, whether actually rightful or not gives a right to main= = tain the action as all but the owner - Ex - When one finds goods - Esp 575. 1 Com 219 Str 505. 777 - Ball 33 - This gives him a kind of property which will support the action as third persons - 2 Saund 47 a note - Cro E 819 S. C - 5 Co 24 b - 3 Wils 332 - Mere right of possession implies a special interest -

So, if on a dispute title to goods between

Trover

A & B. – A obtains possession of the goods, as his, he may have Trover vs a stranger – even tho' the real title should appear to be in B. (94)

But the possession must be acquired either legally or under claim & colour of right to entitle one to this action. For if gained without colour of right it gives no special property even as vs strangers 3 Wils 338. 2 Saund 47 a note – If one steals goods & takes them professedly as a mere wrong-doer, or without a pretended right. Vide Tresp. to things personal 56 –

So, right of possession is sufficient as when Deft having goods of J. S. was bound but refused to deliver them to Pltff. J S's Creditor – action lay Esp 575 1 Bullst 88. 1 Com 219. 1 Bac 242. 1 TR 480. 1 Roll 606 – 7 TR 9 – tho' pltff never had possession 2 Saund 47 a note For a right of poss.n implies an interest – (57)

But a property of some kind is necessary for when Pltff had sent an order for goods to be delivered to his servant & they were delivered to the innkeeper where serv.t lodged – action lay not vs the host in favor of the purchaser – for no property vested in him for want of delivery Bull 35-6 – Sal 18. 3 P Wms 186 Esp 576 – He had therefore neither the possession in fact, nor such a property as draws after it a possess.n in Law or right of possession – Seems, if they had been delivered to servant of pltff Bull 36 For a servant's possession is that of his master

Fundamental distinction between Trover & Trespass – The former founded on property – the latter on possession – Bull 35. Esp 576

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[KB 9. 4 do 489. 1 do 480.] —

But as to a wrongdoer, where original possession is tortious this distinction does not practically apply Since either Trespass or Trover will lie. Tho' in Legal Theory the action of trespass is founded upon pltffs possession - of Trover upon his property - It holds I conclude in point of fact only, where Deft's Original poss.n was lawful - as in case of bailee, finder &c. who convert the goods bailed &c In the latter case trover lies by bailee &c for bailor or owner on the ground of property only.

The actual legal possession at the time of conversion being in bailee &c. But trespass lies not in this case by bailee &c by reason of his actual and Lawful poss.n As Trespass is founded on an injury to possession. But as to a stranger, taking the goods from Bailee &c trespass is concurrent with trover, for bailor (vide Tresp. 32.) in point of form however (ie in declaring) pltff is always supposed out of possession at the conversion -

Uncertificated Bankrupt may maintain it. vs a stranger Bos &c 44. Peak 140. 3 East 140 Cowp 589 For he may hold goods as vs all persons except his assignees - Bailm.t 4 168.

Formerly Executor &c could not maintain the action for conversion in testator's &c lifetime. now he may by the Equity of the Stat 4 Edw III. de bonis asportatis 2 Bac 439. Est 578. 1 Com 219. Cro E 377. Cep 589 Str 60 - 2 Mod 168. So of an administrator though not named in the Stat. The Com. Law rule was founded upon the maxim -

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"Actio personalis moritur cum persona."

Said to have been holden that an averment of (58.)
conversion in intestate's lifetime, is supported by proof
of taking in his lifetime & conversion afterwards
: For the time of using lay in the knowledge of the Deft.
1 Com 221. Ek 589. Str 60. But the court considered
the conversion complete in intestate's lifetime —
The taking was tortious Ek 589. 1 Vent 266, 2 Lu?

Bailees right to this action is said to be founded
on his own liability to bailor - ie (if so at all)
I conceive, on the possibility of his being liable - or
his being accountable - and this always exists -
1 Bac 249. 5 do 164-5. 262. 13 Co 69. F N B. 89-92
Co Lit 89 - 1 Sid 438. But this special property
is the foundation of his right - (see Bailor's ultra)

Doubted in the case of Depositary. 5 Bac 165. pl 22.
Is not the special property sufficient, which he has?
Jones, 112) Case of finder supra possession alone is
sufficient - Besides he may be liable as bailee
liable in all events - see Bailor's 106 7 -

If one delivers to J the goods of J S. the bailee
by delivering them back to the bailor - exonerates
himself from J S's claim - & such a claim
is effectual to bar an action by J S. even if the
delivery back is pending the action # 1 Bac 257. 342
1 Roll 606 7 - F N B. 137 - see Bailor's 90 1 -
Suppose the deft knowing the property to be J S's
has refused to deliver to him. Is not this evidence
of unlawful detainer? The rule is not accom-
-panied by any such qualification -

Recovery by bailor, ousts bailee of his action (59)

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for the full value vice versâ. 13 Co 69. 5 Bac 156 263. 2 Roll 569. Bailm.t. 111-12.

So bailee by suing the wrongdoer first, ousts the bailor of his action (Semb) commencing the action attaches a right of recovery.

So, if bailor sues first, bailee is ousted of his action of trover for the full value - But he may have an action for his special damage - "Bailm.t." 112. Analogous to appeal of Robbery by Master or Servant he who begins first &c 13 Bac 559 - Latch 227 - (post) case of escape vs Shff &c "Bailment" 107.

Bailor by suing wrongdoer, discharges bailee; he elects his remedy! (Semb) If bailee sues first he makes himself bailee to bailor "Bailment" 113-14 -

00). Said (13 Co 69) that he who has the special property shall have trespass, or the action vs him who has the general property &c 7 TR 82. Qu: The bailee may doubtless have special action on the case, to recover special damages 5 Bac 185 5 + 266 - Why trespass: or trover by the bailor? The action is not for the loss of the property but for the use of it - of the special interest. The value of the property is not even prima facie the value of the damages -

Generally retaking the goods (after conversion) to pltff does not oust his right of recovery - mitigates damages only - 6 Ch 581. 5 Bac 266. 6 Mod 202 Cro J. 48. 1 Com 221 - 1 Roll SC 40. 2 Bl R 902 - 6 TR 696 -

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001

Trover

But when the conversion consists in a tortious taking if deft delivers it on demand – there can be no recovery in this action – & that is the only conversion complained of; of course there being no damages for the taking – there can be none at all – Qu. if trespass were brought – Vid 1 Burr 31.

Recovery in trover vests the property converted in deft – except when it has been returned – Esk 593 1 Show 141 – Str 1078. 5 Bac 257. Otherwise the pltff would be entitled both to his property and also the value of it in damages – Indeed he might by repeating his demand maintain any number of successive actions – Satisfaction of judgmt. is unnecessary.

A former recovery (& satisfaction?) by a stranger is a good bar to the action – Esk 593 – Cro J 73 – Yelv 67 – 8. There can be but one recovery – Esk 593 – Str 1078. L^d R 1206 – That is supposed to restore the pltff to his rights – Ex – Suppose conversion by A B & C – Pltff recovers in an action by A alone – This bars his remedy by B & C & the rule holds, tho' the judgment by A has not been satisfied (But vide contra in the case of Co. Trespassers – Yelv 68a Hob 166 – Brook tit judgt. pl. 98 & vide 3 East 258. Cro E 30. & also in 3 Com. 214 tit Ted qu – Whether the test is not correct on principle & by the policy of the law? Vide Tresp 59 – The damages which were before uncertain are by the recovery of judgmt. converted into a debt of record. So, a recovery in Ind: Assumpsit: (The property having been sold) is a bar to trover for the same cause – 5 Bac 280 – L^d R 1217 – (Where the deft is the same in both actions a recovery without satisfaction unquestionably bars a second action – And a recovery in trespass, when concurrent with trover has the same effect (16) For a (61)

Trover.

recovery on one of two or more concurrent actions bars the other or others, for the same cause - Esp 593.

Suppose A finds the goods of B but they are claimed by C - & that C sues A for them & recovers. Does this recovery bar B's right vs A? I think clearly that it does - Note the analogy to the case of payment or under administration repealed or 3 T R 125. 2 Bac 12 - 174 Bl 669 - 682. ag.st 2 Wall 54 - "Bailment" 37 -

Against whom Trover may be maintained -

It may vs the wrong-doer taker - bailee, finder or General rule: -

The owner of goods may maintain Trover, not only vs the first wrongful taker - but any subsequent holder - even a bonâ fide purchaser * 1 T R 487 Ex - Bailee or finder sells the goods) 1 Wils 8. Esp 579 - Sal 282 - 1 Leon 158. 1 Bac 237 - 5 Bac 260. 6 3. Mod 44 - (Provided the sale was not in market overt - So if sale in market overt was in Covin between seller & purchaser - 2 Bl 450. Esp 579. 1 Leon 158. "Bailment" - The maxim under the general rule is "Caveat Emptor" -

* - (He who is prior in right is prior in law) -

(82) - Exception to this general rule (so far as relates to others than first taker) in case of money - Bank notes Bills of Exchange - transferable by delivery - Trover for these can be brought only vs first taker by reason of their currency! When they have been passed over to a third person, on a bonâ fide consideration, they may be now hold - Reason of policy 1 Burr 452 - 5 Ex Sal 126 - L.d Ray 738. Ex - Case of a bank note stolen & paid away for valuable consideration. Esp 580. 39 -

Trover.

3 Burr 1510. 1 Bl R 485. Doug 611 - "Bailment" 98 Chit B.

When goods are pawned, pawnor may maintain trover against pawnee after tender of the money on the day of payment - 5 Bac 264 - Co J 244 - Esp 590 - Bull 72 - 4 Co 836 2 Ld R 916 - Co J 244 - 4 Com 258. Salk 522, 1 Com 220 - "Bailment" 29 -

If pawned on a usurious contract pawnor cannot maintain trover till he has tendered the money advanced & (semb) the lawful interest - 17 R 153 - The action being not to enforce - but to be relieved against the contract - & trover being an equitable action (Bailment 30) - his claim to recover the pledge delivered by himself is considered as standing upon the same footing, as would a claim to recover back a payment voluntarily made on a usurious contract - He must do Equity - "Usury" 23 -

A parol gift of goods without some act of delivery does not transfer the property - The donee of course cannot maintain trover, & the action will lie in such case by donor if he takes possession (without delivery) Esp 577 - 1 Bac 239 - 2 Leon 30 - 1 - 2 Ld. Without demand as the case may be? Would not the gift by parol be a licence, under many circumstances? -

But delivering the key of the room, where the goods are kept, to donee is sufficient - Str 955 - See 1 East 192 - This is virtually giving possession called a symbolical delivery - It is not strictly symbolical however - Vide Donatio mortis causâ (tit. Ecc. & Adm. -)

Trover.

One tenant in Com. or joint tenants, of a chattel can not maintain this action w, his companions' assentage taken of it or "not guilty" (Esp 586. Sal 290 5 Dac 280. 15 R 158. Comp 450 - 1 Day 301.) pro tot. of one being the prop. of both or for both. Seems if it is destroyed by one of them. This seems the interest - so such a wanton act by one can not be deemed to have been done for or in behalf of the other - nor of course the act of both - Esp 586 - Co Lit 200. a 1 East 303 - 368. Bull 34-9 - If brought by one only by a stranger plea in abatement is necessary) Sal 290. 1 Lev 113 - Co 6 544. Esp 411 - Litt f 323 - Sal 4 Mo 820. Comp 450.

For what does Trover lie? -

Personal chattels in general -

This action lies for choses in action of any kind - tho' only evidence of property - The date need not be alleged - Instrument being gone pltff is unable to recollect the date - Esp 588. Cr J 190. 5 R 202 - 1 Com 219 - Cr J 637 - 1 Roll 5 C 20. 1 Root 125. Comp 117. Esp 543 - Sal 130. 283 - 654 - 2 TR 708. (Co 6 723. that it lies not) -

So for title deeds & q Mod Esp 543. 2 TR 708. (Replevin 19) It now lies -

It lies not in general for an animal per se. reclaimed - unless confined & valuable if not confined no one has a property in them. And if no value the loss of them would be of no damage (4 DC 235) - Tho' for such reclaimed animals if owned of any value it does. Cr J Hawk Com. 219. 1 Roll 5. 4 DC 235. 5 Dac 263 - 7 Mod. 88.

Trover.

Hob 283. Cro E. 125.

When wild there can be no property in them
Ex - A wild bird or beast upon my land -

It lies for tame animals as horses oxen dogs &c (63)
Hob 283. So in some cases for animals not tamed
& confined - viz being merchandize & valuable.
Ex monkeys - Parrots &c Cro J 262. 5 Bac 264. 1 Com 219

It does not lie for a negro slave in Eng.d or Conn.t
5 Bac 263. L.d R 146. Carth 397. L.d R 1274. 3 Lev 336.
2 Lev 201 - (Con.t 3 Hob 785) - not a subject of
property in his person - tho' there may be a prop=
=erty in his services - The action for taking away
or enticing away one's slave is a special ac=
=tion on the case; laying a per quod servitium
amisit

It lies not for the conversion of a Record: because
it is not private property. this is a public office.
It does lie for copy of Record - (Elk 542. 5 Bac
264. Hard 111 -) being private property.

It has been holden that it lies not for money
unless in a bag &c - that it might be identified
as in detinue - Cro E 638. 661 - S.C. This is not
now considered as law - For in latter cases it is
holden, that as the object is not to recover the
property in specie but damages only, it does lie
for money not thus circumstanced - 5 Bac 264
1 Com 219 - 1 Roll 5 C 15. 10. Ca C. 89. Cro E 818. 844
not necessary that the specific money be re=
=covered upon the execution but only the same
amount of money -

Trover.

141. If Feme sovereign Husband, convey at play? Trover lies v. Husband - 5 Dac 264. 1 Sid 122 - Bale 33 - 2nd: Afd: appears to be the more appropriate remedy - So of servant -

(5) - The action lies for the conversion of personal chattels only: Converting a thing from another's freehold is not a conversion for which trover will lie. (5 Dac 257) as taking a door from its place & carrying it away. Ex p 129. So of an injury as daily - bringing posts to prove a fence - (But if the owner is "possessed as of his own posts" - a prior severance will be presumed after verdict - Ex p 129. As in the action for a door) -

So, of cutting and carrying away, by one continued act a tree, or fruit growing upon it - growing herbage - a standing crop &c. (B) The rule in all cases implies the severing & carrying away to be one continued act - or to be done in continuity

But for forcibly taking a thing already severed tho' it was before a fixture) trover lies - Noy 125. 5 Dac 257. Ex - taking away a door or window already severed from its place - fruit fallen lying upon the ground or previously fastened to the owner - For in this case the property is strictly a personal chattel at the time of the taking -

So if I cut another's fruit on one day & carry it away the next day (B. in Carcing) Trespass would lie for the severance - and Trover for the carrying away -

(6) - Throwing goods overboard from necessity to save a

Trover

ship is no conversion – 5 Bac 258. 2 Bulst. 283. the necessity is a justification (In such a case there is a contribution by the maxim of law see "Insurance & Bailment" – If the goods of one are hove overboard – (to save the ship) all interested in the ship or cargo must contribute pro rata "Law Merchant".

Pleadings –

Declaration must state a place of conversion or it is said to be ill in substance – Esp 588. Cr E. 78. See – In substance at this time? 2 M. 3) It cannot be law (see "Pleadings" venue It is but form – But trover being transitory the venue need not be truly laid

Declaration in Trover ought to shew property in Plff, but stating posst. "as of his own goods" is sufficient – For that implies a property Hob 691 – 1 Hard 111 – 1 Com 222 5 Bac 271 – and see 1 Saund 379. Str 1023 – Demand & refusal not even necessary to be stated – mere evidence But it usually is stated because originally necessary.

Time of conversion must be averred – Formerly for the omission of this predgt was arrested – Esp 588. 1 Vent 135. Cr J 428. 1 Com. 224. Cr E 97 – Stilles now – When the time of conversion was laid before the trover – the "afterwards converted" – holden sufficient & the scilicet void.

But this would have been ill on special demurrer: It cannot therefore be matter of sub=

Trover.

= stance - it seems now to be mere form - & reached by special demurrer only. See Tidd "Pleadings" - 3 Bac 398. Carth 389. Cro J 428. 5 Bac 316 -

671. The subject must be described with convenient certainty. formerly with great accuracy "divers books" insufficient - 2 Vent 114, 317. 1 Lev 301 - Ezk 587. 8 L^d R 588. 2 Lev 176. L^d R 99. Bull 37. Str 809. As to the necessity of alleging the value of the goods - (5 Bac 275. Cro J 130. 1478. F N B. 88. not necessary according to Ezk 588) & Cro J (148). Lev Ezk 407. 2 Lev 430. 5 Bac 245. Is it not necessary on special demurrer at least? Doubtless it is cured by verdict; but seems necessary by matter of form & to furnish prima facie ground of ~~[illegible]~~ damages - (Vide Tresp: 57 -) As forms - "Trover" -

Said that there are only two good pleas in trover general issue & release - Ezk 592 - 1 Ld 305 - 1 or 5 Bac 276 - But many have been allowed Yelv 198. 1 Show 148 - Cro J 73. Str 1078. Sal 654 vide Str 80 - But justification is not pleadable - for conversion is alleged in the declaration, is not justifiable being ex vi termini - tortious (Bac Ab Trover F 2. Cro E 146) Justification amounts to Gen'l Issue. I trust however any thing similar in effect to a release may be pleaded specially - ex accord and satisfaction. former recovery &c -

But a justification (or rather a defence which justifies the deft taking when or detained) may be given in evidence under the gen'l issue - 1 Ezk 593 - Bull 48. For such a de = fence & disproves the alleged conversion -

Trover.

the latter implying a wrong, so in Con.t under our Stat.) saying that a conversion may be justified, would be a legal solecism —

Holden that the Stat of Limitations in Con.t does not run as Trover — even when concurrent with Trespass. & when trespass if it had been brought would have been barred; See therefore whether Trover is not barred, in such cases —

Assault & Battery.

Assault is an attempt or offer to do a corporal hurt to another by force - but without touching -
Ex - Lifting a weapon or fist in a threatening manner - Cro Battery C. O. 1 Bac 154 - 3 Bl 120 - Esp 312. Bell 15.

So presenting a gun, drawing & waving a sword pointing a pitch-fork at one within the reach of it 2 Roll 545. 1 Vent 256 - 1 Hawk 133 - "Am unlawful setting upon the person to be an offer to beat" (French Law 202) This is an inchoate violence, & amounts to an injury - 3 Bl 120. 1 Revis His. Eng L 85. tho' no actual personal hurt is sustained -

But a posture otherwise amounting to an assault may be explained by words, so as to fall short of an assault - 1 Bac 154 - Ex - A lays his hand on his sword & says "if it were not assize time &c" For the intention must co-operate with the act - to constitute an assault 1 Mod 3. Esp 312 - 10 Mod 187. 2 Hal 545. (not so of battery -)

Words alone then, cannot amount to an assault ancient opinions contra - 1 Bac 154 - 1 Hawk 133-4 2 Roll 545. 1 Com 590.

Battery consists in the actual commission of violence upon the person of another (Esp 312) (2)
The least degree of it done in an angry spiteful insolent, or rude manner * is battery - 1 Bac 154 6 Mod 149. 172. 1 Com 589 - 174 auth 134 - Ex spitting in the face - treading on the toe - (* Where the violence is only nominal the manner is regarded Aliter if there is actual serious hurt inflicted Ex post 5)

"The unlawful beating of another" (3 Bl 120) Qu Is a battery of course unlawful? For it may be

Assault & Battery –

justified (3 Bl 120. Sal 407) Tho' it is often justified as in mollifier manus impositus

Every Battery includes an assault – proof of battery therefore will support a charge of Assault & Battery 1 Bac 154. 1 Hawk 134 – Sal 384 –

Menaces of bodily hurt tho' not amounting to an assault (for words alone can not constitute an assault) are in some cases actionable injuries When they occasion damage or inconvenience they are actionable – otherwise not – 3 Bl 120 Finch L 202. Com. Battery C 590. 2 Roll 545. Ex Interrupting one's business – The action is trespass vi & armis. (3 Bl 120 2 Roll 545) for it is inchoate violence – Special damage is the fact (hence) Should not the form be trespass in the case according to principle? –

To entitle one to recover in trespass for a battery the injury must be immediate; i.e. the immediate effect or consequence of the force employed – But not necessary to battery that the injury should be the instantaneous effect of the direct act of the wrongdoer; Sufficient if produced by a connected train of effects – In general any wanton act by which one causes a battery supports the action (2 Ld Raym 295) – Left throw a squib into the market place which after various discharges & impulses eventually put out Plff's eye – 3 Ld Ry 403 – 2 Bl R 892. 1 Str 634 – So of an elastic ball striking a person after it had bounded 10 times or 100 – A ball glancing –

(3) For the particular distinction between trespass and

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case see "Trespass on the Case" –

To. if one persuades another wantonly or carelessly, & the latter frightens a third – the action lies on the first – Esp. 313 – Bull 16 –

If a horse taking sudden fright runs on a person the rider is not liable unless he was in some fault! – not his act – But if a third person unlawfully struck the horse he would be liable for all con= = sequential mischief – Esp 313 – 4 Mod 405 – 1 Ld 24 – 1 Com 589 – Sal 637 – (Bull (16) says "that he is liable in an action upon the case" – (2 Salk 637 ag.st Joseph. in case E. 5. Is not the wrong doer liable in trespass for a battery – the horse being considered only as an instrument employed by him – suppose that instead of an animal he had put in motion an inanimate body – as a moveable machine – or a rock rolled down a descent – would not trespass clearly lie? 1 Mod 24. 3 Wils 304 – 3 East 523 – It is like turning out a wild bull or tiger –

When a person receives bodily hurt from an act (4.)
to which he consented he may sometimes (it is said) have an action, in other hurt – (Esp 313 – Rule If the act consented to was legal – he has no re= = medy – Volenti non fit injuria Ex – Hurt by playing at cudgels (Lawful) if hurt by boxing to which he consented – he has action (for boxing is unlawful) Bull 16 – 1 Lev 174 – & consent could not make it Lawful, & volenti to does not ap= = ply – consent void –

This rule holds undoubtedly upon an indictment for battery; but how can the party beaten recover in a civil action? For tho' the license is as such

void, yet does it not make him particeps criminis? & in pari delicto potior est conditio defendentis? That the parties are both liable to an indictment there is no doubt.

To consenting to be privately beaten, does not justify the beating. Esp 313. Comb 218. Bull 17. 2a. In the civil action? Would not the above objection defeat it?

But that the injury accidentally happened in an amicable contest, a wrestling is a good excuse - intent good. Laws Plead 175.

If one in doing a lawful act as in defending himself accidentally hurts another, behind him he is liable to the action. 2 Bl R 896. Ray 465[3]

5). Malicious intent* is clearly not necessary in general to subject to the action of trespass vi & armis - Hence a Lunatic is liable to it civiliter not criminaliter.

So if an infant of any age (in parent & child) Latch 13. 110. Long 640. Esp 399. Mob 134. 1 Hob 81 - This it is a general rule that in case arising ex delicto innocence of intention excuses, - Long 649.

(not universal rule 204 Co 64) For the object of the civil suit is not punishment but reparation for damage sustained; & he who caused it however innocently ought to bear the loss, rather than another. (* Intent however is of importance in the assessment of damages) -

But how far accident will excuse an involuntary trespass - has been a question of some difficulty.

Assault & Battery.

According to Fonblanque it is sufficient to make one liable, that he has been the "physical cause of the damage to another" – (1 Fonb 81) – This is too broad a rule – For it would not admit of even inevitable accident, as an excuse – Ex. One's falling on another – Hob 134.

It is said that inevitable accident or "inevitable necessity" only should excuse a battery, as being involuntary Hob 134. 1 Com 589. All 35. 2 Roll 548. 3 Wils 377. 2 Bl R 896 – S.C. 3 Wils 410. Str 596 – 1 Fonb 81. In such case the injury done is not the act of the party excused – He is not in any sense the agent –

Meaning of "inevitable" That to which human care or strength can not guard – i.e. the act should be physically unavoidable. Yet if one defending himself accidentally strike another behind he is liable – 2 Bl R 896 – Ray 467. So if one firing at a mark accidentally hit another – So if his gun should burst in firing and hit another. (6)

Buller (N P 16) supposes that if a horse used to run away with the rider, takes a fright & in running injures another; the rider would be liable on the ground of neglect – But here the remedy would be case for neglect – not the rider's act. 1 Vent 295 –

Rule is clearly that where injury is inevitable – the deft is excused Hob 134 – 2 Bl 896 – 3 Wils 377 – Ex. One taken with the apoplexy falls on another –

True distinction & concise is that if the act

Assault & Battery.

causing the injury is voluntary, trespass lies: & lies - tho' the injury itself was not intended - Ex - I am defending myself, I hurt one behind me -

But where one without acting becomes the involuntary instrument of damage to another - it lies not - Ex A in walking accidentally falls on B.

(7) - According to Eck a trespass to be actionable must be voluntary Eck 383 - cites 4 Burr 2092 Proposition too broad - In the case of 4 Burr 2092 - neglect said to be necessary - but that was the case of a Deer killed by Dog of Deft. The Deft could not be considered as the agent nor the act his, unless the injury was voluntary on his part - Seems if had accidentally killed a Deer -

When the act causing the damage is itself unlawful - the author is in some way, either in trespass or case liable at all events for the consequences - 2 Bl R 893 - 3 R 1574 - 480. 12 Mod 639 1 Vent 295. Ex - case of a tenant (ante) & sets fire to D's building & the fire is communicated to others - A liable for the whole -

The above rules as to accident &c apply to trespass in general -

Defences - Three kinds of defence Denial or Justification - Excuse - Justification - Bull 17.

(8) Assault & Battery are justifiable in many cases Com. 589. 3 Bl 120.
Ex - The Officer having legal process to arrest one

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may use violence in case of opposition so far as is necessary to effect the arrest. Esp 314. 1 Bac 155. 1 How P.C. 130. to any extent.

But a battery is not justifiable in this case unless there is actual resistance - (Ld Raym 229.) or an attempt to escape - 2 Str 1049. Dall 18. 19 Esp 314. 3 Lev 403 - Cro 6. 93 - 2 Ch P 523 - 8 Sh 78. 299. 1 Saund 296-7 so an arrest simply will justify an assault only - ie if to an action of Assault & Battery the Deft justifies both, by a mere authority to arrest (without more) that justification is all. Seems if resistance is alleged - he may justify the battery also -

But a molliter manus &c in making the arrest justified tho' no resistance &c 2 Str 1049 2 Roll 546 - 1 Bac 156. Dall 19. 5 Com 355. (This is in strictness no battery) ie Deft may plead a molliter &c as the justification of the alleged assault - but he must in this case deny the force & arms by the plea of not guilty. Thus - as to the "force &c not guilty" as to the residue molliter &c" stating the special facts which justify it - Pl Asst 447 - 2 Ch P 519. 526-9 Com Pl 3 m 18 - 1 Mod 36 (post 16) -

Plea of "molliter &c" for, it is said in justification of the battery, alleged (Lane Com^t 1 Saund 296 n post 9 - as well as of the assault, Esp 314 - 5 Com 355. Skin 38). Cro 6 93-4 - 2 Vent 193 - Cent 3 Lev 404 & Esp 314 - 2 Ch P 523

The battery alleged can in this form of pleading be justified by mere authority to arrest; Tho' the court, on this rule pronounced justify the battery as such (Rule not law Scrub)

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We must as to the battery plead Not Guilty -

But claim of mayhem, wounding, or bruising be also alleged - where the justification is a mere authority to arrest; Deft must as to these also plead not guilty - as well as to the force & arms - The justification incorporates - 1 Tr R 78. 299 - 1 Saund 296 - 297 n

The modern opinions are that Deft must plead not guilty, as to the battery also, justifying only the assault, as a trespass - 1 Saund 296 n; Tr R 1049 - 2 Tr R 231 - 2 Bent 193 - Hardw 298. 6 Esp 314 - 3 Lev 404 - It is safest at any rate to traverse the battery -

Battery is justifiable on the ground of self defence i.e. in defence of the Deft's person - he may justify a battery as a battery 3 Tr R 120. As if one strikes me first I may strike him in defence so an assault by Plff is sufficient to justify a battery by Deft - as if Plff lifts a weapon to strike 5 Ed 4 - Bull 17 - 18. 6 Esp 315. But quoad the force & arms Deft should plead not guilty according to Pleader Ab. 4 49 1 Lev. Sent Clark ent 20. For he may justify the force to even a wounding - 1 Saund 79 - 296 n. 1 Co 6. 268. 1 Hob 136. Ibid 240 -

But there must be some reasonable proportion the assault or battery by Plff - & that by Deft - For every assault to however small will not justify even battery, however great - 11 Mod 43 Bull 18. & the proportion is a question of fact, in every case - & small blow will not justify

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a mayhem. But if Plff strikes Deft – a scuffle immediately ensues & Plff is maymed Deft is justified Sal 642. 1 Lev 240 Ech 315. Seem if Plff gives slight blow & Deft in return wantonly strikes so as to maym –

The plea in the case of self defence is son assault demesne. i.e. that first assault proceeded from Plff. & that Deft struck in self defence – Plead Offt. 447 – Ech 315. Sal 642 – 2 Ch Pl 523-4 –

But maym here it seems is not justified by Plff's aggression – unless the Plff's act might cause danger Defts life or member – L^d R 177. Ech 315. Sal 642. 11 Mod 43 – 1 Com 590.

As to the replication de injuria &c, see Dost P 76. & Co 60 – "De injuria sua propria absque tali causa" is the technical traverse of the whole plea of son assault demesne – Vide form 2 Ch P 642 "That Deft at the time when &c of his own wrong without the cause by him in his said plea alleged assaulted, beat &c (concluding to the country" See Stankie's Ev. Title "Trespass" –

If the Plff was the blameable cause of the battery (tho' he did not strike or threaten to strike) Deft is justified in some cases – as, according to one statement of the case) when Plff tilted the seat on which Deft was sitting, & Deft bit off Plff's finger L^d R 177 – Sal 642 – But the maym in this case seems to have been justified by Plff's attempting to gouge Deft – according to 11 Mod 43 Ld R. 177 –

So, where Deft thrust his money into Defts mouth

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& a simple assault - but justified Esh 315. Cro J. 366-

Parents are justified in giving children reasonable correction - master his servants: & servants under his domestic government - schoolmaster his scholars - father his prisoners - Esh 315. 1 Sid 176-7. 1 Hawk 130 - Bull 18. So according to some a husband his wife - but this now seems not law - 1 Hawk 130. F N B 80 - 1 Bac 155. These relations constitute special justification. The act is justified by the necessity of personal government in the several cases -

A man may justify a battery in defence of his wife - & e converso - so of parent & child Esh 314 - Bull 18. Ld Ray 62. Considered as self-defence -

(1) Clearly a servant may justify in defence of his master. But e converso quare. By the better opinion I conceive the justification is good - 3 Bac 568. Esh 314 - Bull 18-19 L^d R 62 2 Rolle 546 - 1 Hale 484 - Sal 407. 1 Bl 429 -

The battery in the case of Husband, Parent &c must have been actually in defence of the wife &c to prevent her &c from actual injury - & must be so alleged in the plea - not vindictive - Esh 318 Ld Ray 62 - n Str 953 -

So one may justify battery in defence of his property forcibly invaded, as by breaking a door, gate &c - But if there is nothing more

than a mere entry on another's close (which implies force in law only) the owner is not justified in a battery without a previous request in the wrong doer to depart. Esh 314 - Bulle 19 Sal 641 - 1 Hawk 130 -

In case of mere entry on lands, also the battery must in pleading, it is said, be justified, not as a battery but as a molliter &c - Bull 18-19 - Esh 314-15. Ld Ray 82 - 1 Sal 407 - 5 Com 355. (Com Plead 3 M 15 -) 1 Mod 36 - 2 Ch P. 224 n. The necessity of violent resistance is not deemed so great as in prior cases of self defence &c - See vide 8 TR 78 contra

The last two rules contemplate the owner of property in possession, & are founded upon his right of defending his possession. But when he is dispossessed or dispossessed, a different rule now prevails, which as to real property was not known to Com. Law.

At Com Law one who had a right of possession or entry on lands was allowed to gain possession by force from the disseisor 2 Bac 555. 3 Bl 179 & do 148. (12)

But now by several Eng. Stat. (The first of which is 5 of Rich II.) One may not enter on the lands &c of which another is in possession (as by holding over after a term has expired, or taking a vacant possession) except in a peaceable manner (16) Common law by St of Ct. (St Ct 209) Entry & holding by violence in such cases is called "forcible entry & detainer" which by Stat is made penal -

Assault & Battery -

But these Statutes contemplate only possession which is in some way & in some degree abandoned by owner, as in case of lease, when the original possession is given to lessee & in case of lands of which the possession is neglected by owner & vacant - & casual temporary absence from one's property, as by merely taking a journey is not an abandonment so as to exclude the owner's right to use force "of Title Forcible Entry &c" -

In case of personal property owner is not allowed at com. Law, to regain possession by force - unless feloniously taken - 3 Bl. 4. 5. 3 Inst. 134 2 Roll's Rep. 55-6 - 2 Roll 565-6 -

(131) Provocation by bare words never justify a battery but may mitigate damages - 1 Wils 6 - 624 817 -

A servant cannot justify a battery in defence of his master's goods - 5 Com 354 - Co 6 - 242 - Qu - Suppose them to be in his special keeping may he then not justify? or carrying them from one place to another - The rule seems to mean only, that the servant cannot justify merely because the goods are his master's he not being in possession -

Assault & Battery at different times cannot be laid with a continuando - nor diversis diebus et vicibus &c 624 316 For an assault is one entire indivisible act - Camp 828. See 3 Bl 212 - Cal 130-9 - 1 East 345 - Phil E 134 Bull 85 (as to continuando post -)

And each battery is in its nature distinct but

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doubtless Pltff may allege one battery on one day & another on another in the same declara= tion – in different counts. Suppose battery com= mitted on several successive days, by the same person or pltff. He can not allege them as a continued or a connected trespass – Altho in some kind of trespass –

For battery of wife Husband & Wife should join and the injury should be laid ad damnum ipsorum. For Husband is damnified by ex= pense & cost of suing – & the wife is personally injured & the damage would survive to her – 6 Ep 316 – 1 Sid 387 – 1 Roll 782 Ld Ray 1208.

If laid ad damnum of the Husband only; declaration is ill; judg^t may be arrested. 6 Ep 316 – Ld Raym. 1208. For he alone has no cause of action for the battery. He is a stranger to the right of action, except for the relation in which he stands to his wife. Not therefore like the case of one of two joint tenants or suing alone for a trespass on the joint property.

If Pltff & Wife suing as Husband & Wife are not such it must be pleaded in abatement – 6 Ep 321 – Sid 480 – (14)

If battery has been committed on Husband & Wife he alone must sue for the injury to himself 6 Ep 316 Ld Ray 1208. 1 Roll 782 pl 2 Cro J 655.

If both join in this case for both battery & several damages, writ abates quoad Husband after verdict – 6 Ep 316 – Cro J 658. If joint da=

Assault & Battery -

= may judgment arrested in toto -

Plff may lay in aggravation of damages it is said) many facts for which he could not himself recover Ex. Assaulting servants, without laying a per quod 6 Ep 317 Sal 642 2 Ch P 374 n Qer? Is it to aggravate damages directly - or to show how enormous the trespass was? If or rather the circumstances of enormity under which &c -

At Com. Law a justification must be specially pleaded in case of battery; as son assault - &c So in other cases of trespass 6 Ep 317 - Co Lit 282 2. 82 b It can not be proved under the general issue defence is inconsistent with the issue -

(15) But circumstances which attend the transaction may be proved in mitigation of damages - tho' if pleaded would have been a justification (See analogy contra ✱) 6 Ep 317 - Ex words spoken by Plff at the time tending to excite mutiny in Deft's ship - So I trust of any other justification (✱) Slander p 26 Last section -

If deft justifies he must confess the battery or the plea is ill ✱ 6 Ep 318. Sal 10 Ex - Plea that Deft's horse ran away with him by his will &c for there is no battery by deft - It is in effect the general issue - Meaning of the rule - He can not plead as a justification what virtually denies the battery - Argument - See Precedents 2 Str P 523 - 545 (✱ Rather the ground of motion to disallow the plea)

The [illegible] replication to a plea of son

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assault &c, is - de injuria sua propria absque tali causâ - Ech 357 - 1 Bac 155. 5 Com 354 -

If Deft pleads son assault &c & Plff can justify that assault; he must reply it specially for he can not give his justification in evidence under the general replication de injuria &c Ech 317 - Com 288. *

* The evidence would be repugnant to that replication - As such a replication denies that first assault was by Plff; but a justification of it admits it

Matter of excuse (it is said) may be either pleaded specially, or given in evidence under the general issue - Ech 317 - Bull 17 Sal 637 - 4 Mod 404 - As inevitable accident - Ex: That the injury was accidental in an amicable contest (ante 4) Vide 2 Ch Ld 579 (n x) that matter of excuse must be pleaded And as it admits the battery this seems on principle to be correct rule -

To the plea of mollitiis manus &c with an justification the plff may reply "de son tort de mesme" - absque tali causa (or as the case may be) instead of the absque &c specially traversing any one material point or fact in the plea (See the distinction) Pleading 84 8 Co 67 - Laws 155-6 - Com Pl 720 1 Bac 320) Ex - If Deft justifies under process of arrest: Plff may specially traverse the process; instead of using the general traverse - "absque tali causâ" Which includes a denial of the justification) or an out- (16)

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= Raysons battery - abegum hac, mollitie &c
5 Com 356. Skin 381 - Lutw 1436 - Com Dig 93 -
Ad 16 - (Hence the inducement is necessary to
prevent a negative prognant in the traverse
Lawes 118. Hob 321 - Com Dig Pleader 20 3 Mod 16) -

Plff not confined in the proof to the time
laid in the declaration - may prove any
battery (not barred in Con.t by Stat of Limi=
tations) In Eng.d the Statute does not thus
confine his proof Stat must be pleaded -
Lawes in Con.t) So special plea must cover
all the time - must be as broad as the dec=
laration - See 5 Bac 206-7 - 1 Bulstr 138. 2 Saund
295. Cro E 228. Hob 104 L.d Ray 229-31 - Ed 407
321. 319. 415. 282 - Sal 222 - Co Lit 283. Cro E
32. Bull 17. 4 Bac 79 - Pleadings - Ea - If
justification is pleaded on a particular day
there must generally be a traverse of the
time before & after —

Need Deft traverse as to prior & subsequent
time when he pleads son assault de.t demesne
not - Bull 17. Plead Ass.t 447. For proof of
plff's assault on any day is sufficient to
support the plea: And plff is driven to a
novel argument (if it was at a different
time) of the battery complained of - What is
the principle of the general rule supra? -

(As to the averment quod est eadem &c vide
2 Co R. 530 n 2 Str 694. 2 Saund 5. n 3 -
Ids 82 (n 3) 85 - 298. Ibid 31 —

If the plea should be as broad as the de=
=claration as to the subject matter i.e. - it

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must be an answer in Law to the whole gravamen alleged - & the plea (or pleas) must import to answer the whole (See Pleading 80) Ezk 318. Ez - if plff charges assault battery & wounding a plea reaching the battery but not the wounding is ill - Cro E 268. Son assault &c covers the whole gravamen Ezk 318. For the words are "that the plff made an assault &c & that" deft - there & there defended himself, & if any damage or "hurt it happened". &c Plead Ass: 447 -

Seems of mollitis &c (ante - that does not in Law answer the allegation of wounding or maiyhem: It justifies only the assault & battery, according to the best opinion the assault only ante 8. 9) - For as a justification of wounding & maiy= = hem it would be incongruous & absurd -

In justification founded on the relations of Husband & Wife, Servant &c the assault &c must be averred to have been made to pre= = vent injury to Wife Husband or party af= = faited - not by way of revenge or chas= = tisement or retaliation Ezk 318. Ld Ray 62 n 2 Roll 546 - Hob 958 - (17)

A former recovery of damages for the same battery by the deft or another is a good plea in bar Cr E 30. Ezk 319. 416 - Sal 11 - Cro J 73-4 - Bull 20 Yelv 68. 5 Bac 185. 1 Com 11-12. for the uncertain damages are reduced in rem judicatam & the original damages are changed into a judgment debt, & are of course merged in it - (Mr Seymour, lecturing on

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this title ~~in~~ during Judge Gould's illness says it is not law according to late American decisions - he cited 4 Mass 419. 6 Johns R 26 - Stark Ev. note by Yelv. 68 (n 1) -

The rule holds even if further damage accrues after first recovery Ech 319 - Sal 11 - For the battery is the first (Chittenden vs Blagden S Ct) -

So in trespass generally, a former recovery is a bar as to all continued trespasses committed before the date of the first writ 2 Root 320.

(18) - In this action as in all trespasses - if the injury is done by several the pltff may sue all or any Ech 317. 5 TR 651 - For in general all causes of action arising ex delicto - whether sounding in trespass or case are several - (5 TR 651) as well as joint - & may be prosecuted as joint or several at the election of the Pltff (Miller in case of conspiracy) -

Release to one, is release to all Ech 415. Hob 66.

As to issuing damages the authorities are somewhat contradictory - If two are charged jointly & are found joint tortfeasors, will it lie each paid of all (as they are of course by a general warrant by law) Jury can not sever the damages - Ech 321. 420 - 5 Burr 2790. Cath 19 11 Co 5. Jenk 317 pl 18. Croft 118.

For the act of both or all is the act of each, so

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far as the injury is joint –

So if judgt goes vs both by default, the damages can not be severed (Esp 420. Str 422) for same reason; The Default being an admission that they are jointly guilty of the wrong alleged – for the charge vs them is joint & the default confesses it –

But according to Esp 420. & 2 Str 1140 – If Defts sever in their pleas (Ex one pleading the general issue, another a justification) jury may sever tho' the several Defts are supposed to be equally guilty – Ex – $100 against A. $50 vs B. Esp 420 2 Str 1140 – 79 But this seems not Law – Casey contra 11 Co 6.) Bull 20 S.C. Cro J 348. or 350 – Cook 19. Sp Cro E 860 – Hob 66 9 Co 79 b Str 910 Cro J 348. 118. Contra Esp 321 – Cro J 118. See 1 Saund 207 (a. 2) That the damage can not be severed 5 Burr 2792 – How can severance in pleading vary the rule? Can it even be proper to sever where it is ascertained by the jury, that the whole injury was the joint act of the defts the act of all – being in Law, then, the act of each? –

But it is said that jury may find one deft guilty as to one part, & another as to another, and assess damages severally, & the finding will be good without remittitur, or nol pros id Est – the Pltff may take judgment for both assessments Esp 420. Cro E 860 11 Co 5. 7 – 2 – Cook; unless the different Defts are found guilty of different facts at different times – In that case they are not found jointly guilty but in the other they are necessarily so – The

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act of all in one and the same transaction & at the same time, being the act of each & the injury is in Law indivisible). This qua= = lification seems on principle correct. Sup= = pose A commences a battery alone & B afterwards joins & assists him. Cro J 54 & Bull 20 accord with 11 Co 5 b. in this qualification

There only as to severing damages held of action for joint torts ~~generally~~ generally -

But in case of severance, when the damages ought not to be severed, pltff may prevent defts from arresting judgment or reversing it in error, by omitting on the record one assessment & taking judgment for one only vs both defts - Bull 20 - Carth 19 11 Co 7 a - or execution may go only vs the one vs whom its amount was assessed Carth 20, Bull 20 1 Saund 207 a n 6 - 7 R 199 - 200 - Cro C 239 - 243 - Or if pltff will enter a not pros as to the other

But in all these cases in which the damage ought to be entire, there can be but one ex= = ecution 11 Co 7 a Carth 19. Bull 20. & that if= = sued for one assessment only, & if judgment is entered for both, it is error - 5 Burr 2790 11 Co 5. Carth 19 - Cro J 118. 6 R 321 - 420 -

Pltff may also arrest judgment in these cases if he so elects; & demand a venire de novo Bull 20. Cro E 173 - 176 - Carth 19. Hob 70 - For when the Law requires that the damages should be entire, he has a right to claim that they should be found so -

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First rule is adopted in this state viz that if two &c are jointly charged & found jointly guil= =ty it & each of the whole; damages can not be severed - Larson & Wheeler & S C. November A.D. Term 98. There Defts plead severally "Not Guilty" - (20)

If one of several Co-Defts is compelled to pay the whole, no contribution in Law or Equity - Hist 116. 8 TR 186. So in other cases of tort, Assumpsit 17. Trespass to things personal "58. "Ex delo" &c

In Eng. it has been holden, that a nol pros or non suit as to one of several Defts before judg. vs the others, discharges the action as to all - that operates as a release to the one - Hob 70. 180. This is not now considered as law in Eng. 1 Saund 207 n 6 2 3 TR 511 - 1 Wils 90. 306. L Ray 597. Cath 99 - Bull 20. Croft 173

The court will give the Plff leave to strike the name of one of several Defts out of the Dec= =laration & then to proceed to call him as a witness - Whenever one Deft wishes for the evidence of Co-Deft - Rule - If there is no evidence vs Co-Deft he may be sworn - If any at all he must be tried, before he can tes= =tify - but the court may let a verdict as to him be first taken - (Bull 285. 2 Bac 287 1 Sid 441 - Vide Evidence 119-20) and if acquit= =ted he may be sworn, He is then not in= =terested (See 2 Ph Ev & Starkie Ev contra last clause of this rule given by Mr Saymour)

Assault & Battery.

(21). The jury if they please may vary from the declaration & find only a part – Rule common to actions of trespass in general – Esp 421 – 2 Roll 184 – Cro E. 39. 54 – Ex "guilty of the battery not of the wounding" Finding more than is in issue is idle –

By the English practise if there has been maym=hem the court may on view increase the damages found, at their discretion: and so tho' no maynem is expressly laid in the de=claration, if the judge certifies or reports it – that the injury would amount to maynem might not be known, at the time of bring=ing the action – But it must be done in bank: & felts must be present when the motion to increase is made (for it must be decided by inspection) Last re=quisition is derived from the rule that in appeal of maynem "maynem vel non" is to be tried by inspection Esp 322. Ld Ray 176 Latch 223 – 3 Bl 332-3. 1 Sid 108 1 Wms 5 –

It must be proved to be part of the same trespass for which the damages were given by jury – Bull 21 – Esp 322 –

(22) – So damages may be increased at Lwm in case of wounding Esp 322 – Ld Ray 176 – So of atrocious battery 3 Bl 333 – Manner of wounding must be laid in the declaration For whether there is a wounding or not must always be known when the action is brought – damages are more they increased in it –

Assault & Battery.

Damages not increased in these cases, if the judge who tried the cause, declares himself satisfied with the verdict - Esp 322. 1 Wils 5.

The jury can not give more damages than are laid Esp 420. Cro J 297. But if they do Pltff may have judg. on remitting the excess - Carth 21 - 10 Co 115 b 1 Rol Ab 643 - 4 Bac 25 - b - Rule common to other actions (Judgt. for the whole assessment erroneous)

Every assault & battery it is said is a public as well as a private wrong (1 Bac 156 - 1 Haw 134 - 3 Bl 121 - 4 Bl 45 -) & punishable by fine & imprisonment (ib 5) But this rule can not apply to an involuntary battery (4 Bl 216) St of Cl. 336 - Title "Public Wrongs" —

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False Imprisonment

Every unlawful restraint of one's liberty - or violation of one's right of locomotion, is False Imprisonment 3 Bl 127 - Esp 321 - Ex Illegal confine = = ment in a private house - Street or 2 Inst 589. 5 Bac 169 - Finch L 202. (1)

(Assault & Battery & False Imprisonment may be put in the same declaration - or even in the same count - (B. Seymour)

Two requisites I. Detention of the person II. Unlaw= = fulness of the detention - 3 Bl 127. 2 Ins 529. 5 Bac 169 Finch L 202 -

The unlawfulness consists in the want of lawful authority to detain - Authority may arise first from Legal process Esp 333 - Sal 408. or 2d from special cause, amounting from the necessity of the case to a justification - 3 Bl 227 - as in the case of arresting a felon by a private person Esp 334 - It lies not for the crew of a ship captured as a prize; tho' she prove to be no prize - Doug 572 Such cases belong to admiralty jurisdiction under the law of nations. "Post - Trespass 49"

But every original ✕ arrest of a person for a civil cause, without legal process is unlawful restraint - 5 Bac 169. 2 Inst 57-2 - A custom to imprison without legal process is not good - 5 Bac 169 - 2 Jones 147 - In derogation of the rights of the subject - (✕ Case of bail arresting his prin= = cipal falls not within this rule; not an origi= = nal arrest - So also an arrest to prevent an escape (p 7. 8) -

For the causes which justify arrests, without pro= cess in criminal cases see "Ships & Gaolers" -

False Imprisonment.

(2). A private person is not guilty of false imprisonment by confining a person arrested by a proper officer - at the Officer's request - He is even bound to assist the officer, on demand, if necessary - 5 Bac 169 - pl 24 - 2 Roll 561 -

But an officer having made an arrest on final process can not delegate his authority (or right of custody) in his own absence 1 Bos & Pul 24 - in "Shiff" - This rule seems to be founded on the right of the pltff in the execution -

The most common cases of false imprisonment are those of arrests under void process -

How far Judges & other Officers of the Law are liable for their official acts.

General Rule

I. If any court of Record is guilty of corrupt practices (as imprisoning through malice) the judge is not liable to an action if he acts judiciously & within his proper jurisdiction & does not transgress his authority i.e. does not go beyond the Law Esp 326 - Sal 396 - Cowp 172 - (malicious prosecution page 32) Esp 635 - 17 R 502 - 573-14 - 534-5 - 2 Bl R 1141 Ex - A court having cognizance of a given offence, sentences one to punishment for it without or by evidence; & even from prepared malice -

II. A Judge of a court of record of general jurisdiction, it seems is not liable to any action, or indictment, for any judicial act whether done through mistake or malice

if he confines himself to his proper jurisdic=
=tion Ek 320. 12 Co 234. Sal 396 Ld Raym 467 -
Cowp 472. 1 T R 503 - 534 - 5. 537 - 8. 513 - 14 -
2 Bl R 1141 (where all the cases are cited)

No proof in this case is admitted as the "vehement & violent presumption" in favor of the judgs integrity - He is answerable only to the Sovereign or government - He may be removed from office in the mode prescri=
=bed for by the constitution, or laws of the State - To any ordinary prosecution against him civil or criminal for abusing his authority it is a decisive answer that he acted as a judge (or court) of record -

Reason -

1st. Such an exemption from liability must exist somewhere - in every regular govern=
=ment - There must be some rank of office in which the Law supposes a confidence - than which there can be none higher - There is the same confidence & presumption of integrity in the court or judge complained of as in any court applied to for redress -

2d. Impolicy of holding such Ct. answerable to individuals -

III. But it seems if a court of record or even general jurisdiction has not jurisdiction of the subject matter of the process on which an arrest is made, the judgs are liable For here they do not & can not act judicial=
=ly - 10 Co 76. 1 Haw 16 - 59 - It is all "coram non judice" - Ex - English Court of C B - awards a criminal capias or an indict=
=ment or sentences to imprisonment upon such a prosecution - or Court of C B awards (3)

execution for recovery of land, in a Real action - In the last case the Judge would be liable as for disseising the Deft in the execution. But if they have jurisdiction of the subject & in their proceedings # transgress their authority - they are not liable - Sent - 10 Co 76b - 2 Bl R 1145 - Sal 396 - Ex - awarding a capias vs a peer in a civil case. Inflicting a higher punishment for a crime cognizable by them, than the Law warrants -

IV - Judges of courts of limited jurisdiction (tho' of record Sent) are liable if they transgress their authority - even by mistake - see 6 T R 412 - 2 Bl R 1145 - Ld Ray 454 - 1 Sal 396 - Str 993 Ex 831 - 8 Co 114 - Ex - Issuing in a civil action a capias vs a peer - Inflicting a higher punishment &c as above - But if they do not exceed their authority - tho' they act illegally & unjustly - Yet the uncontrollable or vehement presumption of rectitude (ante) does not exist in favor of all courts - Not necessary except in favor of the highest courts known to the law - 2 Bl R 1145. If they wrongfully decide a question of Law, through mistake - or ignorance, when the question is properly before them & they have authority to decide -

Judges of record not liable even for malicious acts if they do not exceed their authority - 6 Ex 326 - Sal 396 -

By a court exceeding its jurisdiction (as to the subject matter) I mean its deciding or

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acting upon a case or question, on which it has no legal right, to decide or to act at all (Ex Ct. of K B. deciding a real action or C B trying an indictment) – By exceeding its authority merely, I mean its exercising some power which the Law does not authorize upon a case, or which is cognizable by it – Ex C B – awarding a capias vs a peer, in an action of debt, covenant broken &c of which they have cognizance –

V. Courts not of record (as Justices of the peace in Eng^d) – are liable at Com. Law not only for malicious wrongs but for any mistake in judg^t. – (Str 910 – Cro E 286 & 394 – 1 Bl 354 1 T R 536 – Esp 339 – 1 Burr 595) by which a party is injured See 2 Bl R 1145. (Post 14) And whether they transgress their authority or not –

But this rigor is mitigated by several Stat^s. Esp 338. (4)

The Court of K B. will not grant an information vs a justice who appears to have acted uprightly. 1 T R 635 –

In Con^t. justices of the peace are Courts of Record – (In New-York they are not –)

Courts which can fine & imprison are said to be courts of record – Ld Ray 467 – Sal 200 – Carth 491 – 3 Bl 24-5. 12 Mod 386 – 3 Lev 205 – Deemed to be universally true – 2 Bl R 1146 – (A power to issue process of arrest is a power to imprison Scott 3 Bl 25) –

False Imprisonment.

(5)- As to arrest of persons not liable to arrest- Arresting Executor or Administrator for the debts of Testator &c is unlawful, except on a suggestion of devastavit -* Esp 326- 3 Wils 368. 2 Bl R 1192- False imprisonment lies in these cases vs the Atty as well as the original pltff (Ib)- & the rule is general that an attorney who is instrumental in causing an illegal arrest is liable as well as his principal - 3 Wils 345. 377- & 2 Bl R 1192 (*. A devastavit subjects him personally - it is in his individual capacity -)

Exemptions from arrest are sometimes connected with the character of the individual as Ex - supra - Sometimes it arises from temporary circumstances or particular privilege (4 Com 475 - 4 Bac 222 - 2 Roll 273 - 2 T R Bl 636) as attendance on court as a suitor or witness * exempts from arrest on civil process - in the latter case the arrest is not illegal in the first instance; but a supersedeas issues (4 Bac 222 & 7 R 534 - 2 Bl R 1142 - 1113 4 T R 337. 5 Bac 171 Cro J 379 - Doug 649 - 652 - after which detention is illegal & action lies - (The privilege of a suitor or witness, extends to his horse, menial & necessaries - (4 Bac 222. 2 Roll 273 - Doug 652 - Cro J 379 - 5 Bac 171 - 4 Bac 684-5. F N B 236 - 1 Co 52 b. Cowp 9 - (* - going to & from Court. O.S)

3 Bulst 97- What is said by Buller J (Doug 652) must relate to an action after the supersedeas or for the prior detention in case of a peer -

False Imprisonment -

In Cont. a writ of protection is commonly obtained in these cases - before the time of attendance - This operates as a supersedeas does in Eng. - Arresting one therefore thus protected is false imprisonment - but not till the protection is shewn - (b) -

The writ in these cases however is good, & the suit continues - 1 Kel 220. 2 Bl R 1193 - The only effect of the privilege is that the person (as suitor, witness &c) must be discharged - Decisions in N Y accord)

Privilege of suitors is disallowed in case of collusion - So as to Plff in vexatious actions 2 Bl R 1193 - 11 Mod 79 - Cowp 9. 174 Bl 636 - It being discretionary with the court to allow it or not (So the bringing of several successive ejectments, for the same subject an example of vexatious suit?) So when party attends court as a volunteer upon the pretence of answering process, when there is none - Sal 544 -

Party attending arbitration under rule of court comes within the exemption - 3 East 89 - Peak Ev 193-4 - For the arbitration act under an order of the court - & in some measure represents it - Indeed the arbitration is a species of court, recognized & regulated by Law.

For arresting a peer - or certificated bankrupt (when the court has jurisdiction) the officer is not liable, he is bound to obey the writ - the party may be liable in case -

False Imprisonment.

Doug 646- 650. 10 Co 76 b - 2 T R 231- Esp 530- Malicious prosecution p 31 (For if the act of arresting is not a trespass the party can not be liable in that form (ie in trespass) but for making a wrongful use of lawful process)

So members of congress are privileged in ordin= =ary civil cases - in going - attending &c - So members of our State legislature (In none of these cases I trust is the arrest actionable unless the party has the evidence of his pri= =vilege with him at the time -) So our electors in going to & a meeting of the electors appointed by Law? -

(7)- Gaoler detaining prisoner for prison fees (tho' otherwise entitled to a discharge) is not false imprisonment - 5 Bac 171- 1 Pow C 173- Pow 88 2 Inst 53- Aliter as to board Root 158. This is a matter of private contract between the gaoler & prisoner - Gaoler trust to the personal cre= =dit of the prisoner, if he has no other security At any rate there is no lien for board on the person of the prisoner 1 Vent-237 - 1 Pow C 173 Plow? 68. 1 Mod 132 -

If the order of court is to confine one in a cer= =tain prison - confining him in any other is false imprisonment - 5 Bac 171- Sal 408. 5 Mod 295. 3 Sal 219 - Hob 202 - 1 Sid 318. Latch 16- It is confinement without lawful authority ("Shipp & p 4" -)

A peace officer is justified in arresting without warrant on a reasonable charge of felony,

False Imprisonment -

tho' no felony is committed. Doug 334. 345. 4 Bac 517. Hl 73. 1 Rolle 43. It is his duty to arrest on reasonable suspicion -

Alike of a private person: But if a felony has been actually committed: - a private person suspecting another to be guilty - on reasonable ground & without malice, is not liable for arresting without warrant - to carry before a magistrate - Ezk 334-5. Bac 171. Doug 345. Rost 66. Seems if no felony has been committed Ezk 334. Doug 345. For he is not like a peace officer, bound to act - ergo not justified to the same extent -

So to prevent a breach of peace or an escape 1 Bulstr 154. 2 Hawk 82 - Any person may arrest for such a purpose without warrant seems after a breach of the peace is committed -

Any original arrest on Sunday in civil cases being void (by St 29 Car II. & St of Cons. 370.) is false imprisonment Ezk 327. 605. 5 Mod 95. Sal 78. 2 Swift 111 - 4 Bac 456. 17 R 265. 2 Bl R 1195. Such an arrest good at Com. Law. 2 Bl R 1195. 2 Bulstr 72 - (8)

But special bail may take their principal on Sunday (alike as to bail to the Sheriff -) 2 Bl R 1273. The right is not deemed necessary I suppose, constant custody on original process not being required) for he is in the nature of a Gaoler -

+ taking by bail is as retaking on an escape - (Such an arrest in case of an escape is lawful

False Imprisonment.

Sal 626 3 Sal 148. Ser 2 Bl R 1273 - (* no escape warrant can be necessary if the arrest is by the person who had the previous custody of the escaper)

Arrest in civil cases by the breaking outer door of Defts house is false imprisonment 5 Co 93 - Cro 1 Hob 62. 2 Bac 367 - Seems of inner doors 2 M & S 489

It has been questioned whether if an arrest has been made by illegal breaking of the house the execution of the process is good - & the only remedy by action: So ruled 5 Co 92 b - 5 Mass 155) or whether the execution of the process is itself void & may be set aside in a summary way, by discharging the person arrested Cowp 19 - 6 East 604 - 5. Cro 5 908 Kirb 383 -

9). Now decided that the execution of the process is void & the officer a trespasser. 2 Bl R 823 in case of property taken by breaking a door & execution set aside - 2 Bac 367 - 4 do 454 - 2 Lev 285-6 - Cont. 5 Co. 93 -

In these cases of arrest by breaking the house, false imprisonment lies - It is the privilege of the party & the arrest is ab initio illegal - Cowp 1. 9 Hob 62 -

It has also been questioned whether if an illegal arrest has been made, & in consequence of which another arrest is made which would otherwise be good; the latter is valid - It is valid unless some collusion - 2 Bl R 823 - East 685 Aliter if there is collusion Semb Pl - (Shepp. Tr c 9. 11) -

False Imprisonment.

Decided in Con.t that an Officer by Escape=
=warrant may retake his prisoner in another
state 1 Rost 107. Practice 8.4 - (The warrant is
of no use except as convenient evidence of a
right to retake - Process can not run out of
the State where issued) As to bail piece from an=
=other State 5 Esk 172 n 7 Johns 145 -

If an Officer by mistake arrests B instead of (10)
A on a process vs A he is liable for false
imprisonment. So even if B declared himself to
be A 2 W? Dong 42 2 Roll 552 pl 5. Esk 328.
3 Com 490. 493 - Moore 457 - Hard 323 -
Damages mitigated - Esk 328. But can the last
rule be Law? Is not B the procuring & faulty
cause of his own arrest? "Battery" 10. See also
L.d Ray 177 - Sal 642 -

Any person has a right to arrest another
who is fighting (5 Bac 171 - 1 Hawk 136 2 Ro 81 -
& to restrain him till his passion is over -
Femes covert tho' liable in some cases to be sued
with their husbands, cannot in general be hold=
=en under arrest on mesne process 2 Str 1272
1 TR 484 - 1 Bl R 720 - 1193 -

But they are liable to arrest in such cases
for the purpose of having Com. Bail entered
or till the Husband gives bail for both - They
are then entitled to be discharged - 2 Bl R 1933-4
Dong 648. 2 W Bl 17 -

Arresting & confining one for a short time, (11)
under a parol warrant from a justice, for
examination is not illegal - 5 Bac 172. Rost
166 - Mo 408 See Cro E 829 -

False Imp.t

A private person may without warrant con= =fine a person disordered in mind & who ap= =pears disposed to mischief 5 Dac 172 -

As to liability of Officers executing process: - If an Officer (under the authority of a court of limited jurisdiction) makes an arrest on a process, from the face of which it ap= =pears, that the court issuing it, had not complete jurisdiction, he is liable according to some of the authorities (Ex 391 - Bull 82 - 3 Ward 481) from whatever cause the defect of jurisdiction arises - i.e Whether the want of jurisdiction goes to the subject matter - or arises out of some personal privilege of the deft - not to be sued in the court to which &c: or from the cause of action arising out of the courts limits &c L.d Ray 230 - 1 - Con.t (But the rule applies (to this extent) only to courts of limited jurisdiction) post 12 - 10 Co 76 b. 6 do 54 a 3 Wils 345. Aliter in two last cases, if the Court is of Record & of general jurisdiction p 12 -

But the rule has been extended much further thus in the Marshalsea case it was holden obiter (without any regard to defts appearing on the face of the ~~Record~~ process, or not -) that in a case where the court had not com= =plete jurisdiction (ut supra) the Officer would be liable 10 Co 76 - 7 - Cro J 314 - Ex 337 - See decision & reasoning in "Marshalsea case" Reasoning contradicted in L.d Ray 230 - Str 710. 903 504. Coke supported in 2 Wils 385 - S.C - Ex 398 399 - Ex - City Shff executing a City courts process

False Imprisonment.

when the cause of action did not arise within the city - but this fact not appearing from the process - But this rule appears not to be Law.

Decision in the Marshalsea case was merely
That when the Court issuing the process has no jurisdiction of the subject matter, every thing done under it is absolutely void - whether it appears or not on the face 6 Ch 391. Bull 82-3. 653-4. Cowp 172 Hard 480 Str 710 - Lev - 2 TR 653-4. and Officer liable - (12)

This seems still to be considered as Law -

But (by other opinions) when the Court (tho' of limited jurisdiction) has jurisdiction of the subject matter & the defect of jurisdiction is from something Local or personal, the Officer is justified unless the defect appears upon the face of the process - This appears to me the correct opinion tho' opposed to the last rule in p 11 - Cowp 20. 5 Bac 170 - 2 Mod 196 - 1 Vent 369 - Bull 82-3 - Carth 274 - 2 Mod 29 - 3 Bac 233 - 6 Ch 329 - 391 - Hard 480 - Str 710 - (Bul or Bat 83 cont. 10 Co 76 b 6 Co 54 a as a case of Common Pleas) 3 Wils 345 - 2 Hob 705. 544 - 3 do 213 - 6 Co 54 a Aliter if do appears Ex - City courts or inferior process upon the face of which the cause of action appears to have arisen out of its juris-dictions -

According to Ld Ray 230-1 - he is not liable tho' the defect does appear on the face of the process; and that original deft is sufficiently protected as an Officer, by pleading the defect &

False Imp.t

if he does not he waives it - Sed qre? whether this is Law in Eng.d? not p 13.) -

Officer may justify under process of the Courts of Westminster tho' the writ be void - Except where the court has not jurisdiction of the subject matter 10 Co 76 b 6 Co 54 a 3 Wils 345. (Ex Returnable to a remote term (p 14) Yet in this case it is void upon the face of it - & Pltff liable for false imprisonment - or other irregularity) the high authority of those courts justifies him. So if he arrests a peer under a civil capias from such a court - or an attorney of another superior Court -

(Rule in Cont. an officer is justified by his process in all cases unless the process is void upon the face of it. Keil 110, 182 2 Lev or Swift 387 even tho' there is a defect of jurisdiction as to the subject matter —

13) - But tho' the process justify the officer according to the foregoing distinctions (tho' the jurisdiction be not complete as to person or place) it does not; the original Pltff - He is found to know the extent of the Courts jurisdiction & to chuse it where the cause of action arose - Cro J 314

And the original Deft (now Pltff) is not barred by having pleaded to the first action Est 330 - Wms 83 - 5 Bac 170 - 1 Vent 36 - 2 East 260 - 2 Mod 96-7 -

L.d Ray 230. Assumed that the original pltff is liable in this case Lutw 37. 150. 1 Vent 236 - are cited - see Cro J 20. L.d Ray approved in

False Imprisonment -

this point in Con.t by Law Ellsworth Kirk 111 —

In some cases process is void, and the party as the case may be the court liable for an arrest under it - where the jurisdiction of the court over the cause is complete as to the subject matter - person & place (14)

I. In cases of limited jurisdiction, when an authority given by Statute, is not strictly pursued Ech 331 - 337 - 8 Co 114 - Sal 408. 1 Str 710. see these authorities for examples. As when a justice committed a man for killing game, tho' he had sufficient effects to answer the penalty - justice holden liable - He exceeded his authority (ante 3) Officer excused but the illegality of the warrant was not patent & the justification was complete - 1 Wils 153 - Ech 332 S.C -

So ~~&~~ against commissioners of bankrupt for any commitment not warranted by their stat powers Ech 331 - 2 Bl 1035. 1141 -

II. In other cases the process of any court even the Court of Westminster, may be void independently of any question of jurisdiction For irregularity renders any process void (h 12) & the pltff in the process is liable to this action * Ez - A capias returnable to the next term but one to that of the teste Ech 328-9 - 3 Com 491 3 Wils 341. 345. 2 Bl R 485. Sal 700 - 1 Rost - 315 - Officer not liable in this case if the process is from the Court of Westminster, & tho' the irregularity appeared on the face 3 Wils 345 -

(* Is he liable before process set aside? See infra

False Imprisonment.

But if Officer executes irregular process of any court after it has been set aside for irregular=ity he is liable in trespass - cent Ld Ray. 73 - 2 Bl R 845. 3 East 128. 15 do 612 - 615 n 2 Sid 125 - 1 Str 509 - Esp 391 - 1 Wils 345. For he then does not act under the authority of the court. (So of process of inferior court before setting aside I suppose) -

(15) So tho' the original arrest were lawful - yet for any subsequent oppression this action lies by the Officer - or the magistrate - if he is in fault - Ex Wanton cruelty in confining in a dungeon without air &c Esp 332 n cited 1 JR 536 -

General Rule - an arrest under an irreg=ular process is void - tho' the jurisdiction was complete - So under process of arrest, founded on an irregular proceeding - Ex - an arrest on an Execution issued on a judg^t set aside for irregularity - Esp 329 391 - 3 East 128. 1 Str 509 - 7 Ray 73 - 1 Lev 95. 1 Sid 272 - 1 Wils 345. 155. 2 Str 993-4 -

But the officer executing irregular process (of a Sub C^t I conclude) before it is set aside is not liable tho' it be afterwards set aside (Qu. if issued by an Inferior C^t & irregular upon the face of it?) Esp 391 - Ray 73 - After it is set aside the pl^ff in it is liable, & semb in trespass Ib. Sed qu. as to the form of action - 1 Sid 271-2 - 1 Lev 95. 15 East 615

But an arrest on an erroneous process (the jurisdiction being complete) is good - 4 Dac 450

Str 509 - 710 - 3 Wils 345. 622 391 - Therefore the party as well as the Officer may justify under erroneous process "till it be reversed" - 3 Wils 345. LE he may justify in trespass all acts done under it, before reversed - Good till reversed - 2 TR 231 - 7 do 455 - 3 Bac 333 - 2 McN 488-9 -

Recapitulation of the general distinctions (as to the Officers liability) which appear most reasonable: - Rule seems to be that - in Eng.d according to all the authorities 1st That when the subject matter is out of the courts jurisdic = tion (where the jurisdiction is general or limit = ed) officer is liable - tho' the defect does not appear from the face of the process - Stiff. 1

Alias when the want of jurisdiction is only to the person or place; then officer not liable un = = less it appear upon the face of the process (But as to this the opinions are contradictory) 3d - Nor then in case of process of courts of Westm.r 4th But the second rule tho' true of mesne process, applies not, it is said, to final process issued by inferior courts LE when arrest is under final process of inferior ct. Officers justification must show that the cause arose within the jurisdiction, or at least that it was so laid; not enough that the defect did not appear from the process Ball 83 - Comp 20. (Qu de reason?) Because the record will furnish the means of knowing? Is this a sufficient reason? -) p 18.

5. If process of a court of limited juris = = diction is complete in all respects; officer liable if the defect is apparent, otherwise

not I conceive - Proceß of Sub Ot of Wcestr. justifies Officer in both cases - (aliter as to the Plff in the proceß) proceß merely erroneous always justifies all acts done under it, before reversal -

(16) - Proceß has been holden irregular & void when filled up without proper authority - Ex - When in Eng^d the under Shff left a blank for the Atty to fill up with a name of a bailiff - Ek 329 - 2 Wils 47 (The person sued here was the person receiving the proceß It does not appear that he knew the irregularity - However the proceß here was without any legal authority - the same in Law as if forged - Hence Officer would be liable, I trust, whether the defect was apparent or not -

So when the proceß "has issued informally" Proceß out of the Vice Chancellor's court of Oxford - custom: Original plff making oath of his cause of action, & that "believing" &c - he swore that he "suspected" &c (Ek 329. Str 993.) Party & court, Officer & gaoler - holden liable all joining in one plea (Strange adds that Officer & Gaoler might have justified (Str 994 - (Denied 2 Wils 385.) & the whole said to be "coram non judice") As the court had only conditional jurisdiction of the subject matter; & the contingency conferring this jurisdiction had not happened -

(17). So, where on mesne proceß the writ is not returnable on a day certain: it is irregular Ek 330. Cro J 314 - Dy 262 b pl 33 - 2 Bulst 36 - 1 Mod 81 - Ex - At the next court of Marshalsea

in this case the irregularity would appear - ergo Officer as well as party liable in principle X-
Seems, if issued by a court of Westm.r their terms are known as part of the Law of the Land (ante 12) But the case has been denied & "next court held sufficient" - Cowp 21-2 - 2 Mod 58. The rule however is clearly law. For if no day were ap= =pointed in any manner the process would clearly be irregular (X. Centon L.d Ray 230-1-

But this last rule applies only to mesne pro= =cess Cowp 21- For the time of returning final process does not concern the Deft-. The proceedings in the suit are at an end The execution does not - (like mesne process) require the appearance of Deft- in a court- nor any other act of him -

Arrests under general search warrants are illegal - So are general warrants of any kind - As a warrant to arrest "the authors of a libel" whoever they are East 399. 1 Hale CP 150. 2 Wils 275. Hist 213 -

Requisites to a Search Warrant.

1st. Granted on oath - 2d The grounds of suspi= =cion declared - 3d Executed in the day time by a known Officer - & in the presence of the informer 4th. Directed to a particular place (or to the particular person in whose posi= =session &c -)

When these requisites are observed, the informer is justified, or not by the event - East 399 - (18)

False Imprisonment

2 Wils 291-2 - When not observed he is of course liable, in any event - The Officer, I trust is not liable in any event if these requisites are observed - whatever the event may be -

When an officer justifies, proof that he acted as an officer, is sufficient, as to the fact of his being one that is primâ facie so - He is not bound to show his appointment - Str 1005 - 3 TR 632 - 4 do 366 2 Wm Bl 485. This may be rebutted (So of a Lawyer being in Slander for words injurious to him in his profession - Note the analogy (Vide Slander 8) -

When the Officer serving process justifies under it, he need show only the writ, or process itself (pl 13 - Esh 333 - 337 - 6 Co 52 - 2 Roll 563 -) that it is returned if mesne process Esh 337 - Str 1184 - See Cowp 20 -

But the necessity of Officers shewing a return obtains only in case of mesne process Cowp 20 5 Co 90 b - 4 Co 67 a 1 Wils 17 - Nor is he bound to shew any part of the original record -

And an under Shff is not bound to show it in any case - not in his power - Seems in Ct. here he is a known public officer & makes return in his own name -

But if original Plff is sued for an arrest on final process: he must show a judgt. as well as Execution - (Esh 337-4 Sal 408 -9) for judgt. may have been reversed be-

=fore the arrest & pltff (original) ought to take notice of it -

Same rule when the action is vs a third person (as an Atty) who procures the service of process for another: Secus - if he acts in aid of the Officer & at his request - Sal 408-9. In the former case he takes the place of pltff, in the process; in the latter he is protected by officers authority - (19)

If a Shff having made an arrest does not return the writ, when he ought to do it, he may be treated as a trespasser ab initio - 5 Cow 581 - 2 Roll 563 5 Bac 162 Sal 409 Ld Ray 632 - tho' this is mere omission - For without the return the writ is not evidence, the justification can not thus appear. ⁂ Trespass to Real property p 20 (⁂ It seems not correct then to apply the doctrine of relation - As the result itself can not appear to have been lawful) A mere omission can not make one a trespasser by relation

If original Pltff & Officer are sued together, they may sever in defending, & if they join, & the plea of justification is insufficient for original pltff it is so for Officer Esp 336 - Str 993 - 1184 - 509 - So e converso, if plea is not good for Officer & would be for original pltff, he has his defence by joining Esp 396 - Str 1184 - 1 Wils 17 - Ex Officer does not show the return of the process when he ought to do it -

False Imprisonment.

Procuring, commanding, aiding or assist=
=ing in a trespass - makes one a tres pas=
=ser - a principal Co Lit 57 a - 1 Sal 409
2 Hawk 512 - (Servant keeping the key
of a room, knowing that one is impris=
=oned unlawfully in it, is guilty of false
imprisonment 3 Wils 377 - 5 Co 579 -
Co Lit 57 a -

(20) Procuring even a sovereign prince thro'
fear, unlawfully to imprison one, is
false imprisonment in the procurer -
2 Bl R 983 - 1055 -

Malicious Prosecution -

This action lies to recover damages by one, who has (27)
prefered an indictment, or other prosecution
or brought an action by pltff maliciously, & with=
=out any ground or "probable cause" F N B 116.
Esp 525. 527-8. 1 Bac 61 - Any wicked or unlawful
motive is malice -

Analogous to the old action of conspiracy, which
is now much out of use - Conspiracy lies only
by two or more, for having falsely & maliciously
prosecuted the pltff - for treason or felony & thus
endangering his life - 1 Saund 230 n a. Finch L
305. 3 Bl 126 - 2 Bulstr 271 - Esp 530 - 1 Com 158. L^d?
Ray 374 -

Another analogous action, is the action on the case
in nature of conspiracy, It lies where two or
more conspire to prosecute another, malicious=
=ly & without cause: or otherwise conspire to
injure him, in person, fame or property -
Finch L 305 - Fal 14 Esp 530 1 Bac 61 - 1 Saund 230 a

The gravamen in the action for malicious
prosecution - resembles in some measure that
of slander - It is not necessarily or generally
the personal danger, to which the pltff has
been exposed, but the vexation, expence &
scandal, to which he has been exposed & sub=
=jected by the former groundless prosecution -
3 Bl 127. 10 Mod 210-20 Str 691 - Fal 13-14 -

Action of conspiracy lies not, unless pltff (28)
has been actually prosecuted - Esp 527-8 -
& acquitted 12 Co 23 - Cro J 8. 1 Roll 112 - For so
are words of the writ - F N B 114. 116. 260 - 1 Wms 211 -
Esp 530. 1 Com 161 - Indictment for conspiracy

Malicious prosecution

lies, when there has been an unlawful conspiracy, as above tho' nothing is executed - 2 Lev 51-9 Co 56 b 6 Ep 530 - So action on the case in nature of conspiracy lies, tho' no indictment &c has been actually exhibited - 1 Bac 61 - 1 Roll 112 - 1 Com 158 & 225 - 2 E for charging a crime by conspiracy - such charge being injurious to Pltff's reputation -

Further difference between action of conspiracy & action on the case in nature of conspiracy
In the former if all but one are acquitted judt can not go vs him - in the latter it may go vs one only - 6 Ep 530 - Ld Ray 394 - 1 Com 159 - Bull 14 - 6 do 16 9 - Cro C 239 - The first is a formed writ in the Register - (1 Wms 211 - 3 N & B 260) the latter a special action on the case - In the former the gist is in the personal danger to which the conspiracy exposed the pltff - In the latter it is the consequential damage scandal &c - Carth 416 - 3 Bl 126-7 - Bull 14 - 10 Mod 219 Str 691 - 1 Saund 230 a -
In case for malicious prosecution the gist is the same as in the latter action -

29) Action on the case in nature of a conspiracy, is substantially an action for malicious prosecution with this difference - That the latter may be brought vs one no other being concerned - lie for a wrong committed by one - The former must be brot vs two or more, or vs one charging that he with another, or with others had conspired &c

Malicious prosecution -

So that to found this action the wrong must have been committed by two or more 1 Com 159.

The grounds of the two actions are therefore the same Esp 531 - 2 Lev 52. Cro C 173 - or 239. Mitchell v Mills 1 Wils 210 - 1 Saund 230. a Ray 176 5 Mod 408. And tho' two are sued judgt. may be v one only in both cases (Ib) -

Action of conspiracy - on the case in nature of & for malicious prosecution, are all unknown it is said to the Com - Law - ✱ (3 Revis. St. E.L. - 239. 328. 3 do 127 - The latter two are derived from the Eq. of the Stat of Westm 2d (13 Edw 1) (2 Lev 20) (✱ As to writ of conspiracy see Cont. Bull 14 Carth 416) -

It is essential to the support of the action (for malicious prosecution) that malice & want of probable cause in the former prosecution should have concurred - Falsity alone not sufficient - Bull 14. Esp 529. 4 Burr 1971 - 1 TR 544 - 5. It lies therefore v any one who maliciously promotes a false prosecution v another, knowing the charges to be false, or having no reasonable ground to believe them true - But it is always sufficient for Deft, to shew probable cause whether he acted with malice or not. Bull 14 Esp 533. Cro E 909 - Probable cause is a complete justification - Otherwise every unsuccessful Pltff or prosecutor might be subjected to this action -

In Ct. when the action is for a false & malicious civil suit - it is called an action for a vexatious Law suit - (30)

Malicious prosecution -

II - Of criminal prosecution false & malicious &c

1. If a man is falsely &c indicted for a crime that would injure his reputation he may have the action - 1 Sid 15 - Yelv 46 - Sal 14 -

2°. So if the charge exposes to danger, his life or liberty - Sal 15 - 3°. So an indictment false &c subjecting to expense only is sufficient to support the action - 2 Bac 278. Sal 15 - arg. Str 379 - Esp 258. Str 777 - 4. Ex Husband may sue for expense incurred in a malicious prosecution of his wife - action lies -

Danger to the life or liberty of Pltff is not necessary then - to found the action - Thus the indictment having been ill, so that Pltff was in no danger of conviction, is no answer to the action if the charge of injures his reputation or property, ut supra - Ex 528. 7 TR 248. 3 Bl 129 Sal 15. 1 Bac 61 - Scandal alone sufficient - The vexation & expense are also usually sufficient in such a case -

So, if the indictment (in the last case) has been not found by grand jury, yet the action lies vexation, scandal & expense &c ~~arising~~ arising from its present-ment - Ex 528. Ex 490 Sal 14 - Ex - Where grandjury have found "not a true bill" -

31) - So expense alone caused by insufficient indictment will support the action - Ex - Indictment (false and malicious) for exercising a trade without license - tho' the reputation of the party is not injured - nor his personal security endangered - Sal 15 in

may. 3 Bl 127 - 10 Mod 148. 6 Mod 25 - 73 - 137 - 1 Bac 61 - 6 Eb 528. 2 Str 977 - Sal 1415. Cont.

Public officers however commencing prosecution on false information are not liable; but the person giving the false information knowing it to be false, or without malice & without probable cause, is liable - 1 Leon 187. Cro E 130 - 2 TR 231 - 1 Bac 61 - It is the duty of such officers to prosecute on information apparently creditable - the Law of course justifies them in such cases -

But a public officer without information, of his own mere motion, maliciously or prosecutes another, he is liable - 1 Bac 61 - 2 TR 231 - 225. Cro E 130 - 1 Com 157 - Cowp 161 - For tho' the Law protects him in misjudging, it does not excuse his wilful abuse of official power -

But if the public officer in the last case is the magistrate, granting the warrant: the gravamen is that Pltff was arrested under it trespass not case is the proper remedy: And in this respect the case in Cro E 130 - is denied 2 TR 231 - Eb 530 - Ca Dany 650 - (False Imprisonment h 6) For he is regarded as the immediate & not the remote cause of the arrest (as informers are)

The constable or Shff being but an instrument he is bound to execute the process -

This action lies not till the malicious prosecution is at an end - 9 Co 56 - Hob 267 -

Malicious Prosecution.

Bro 205. 10 Mod 209 - Str 114 2 TR 231 - Either = = wise the Pltff might recover, as for a malicious & groundless prosecution - & afterwards be convic = = ted upon it -

(32) Hence it must always appear from the dec = = laration that the prosecution for which he is in Somewhat at an end - In conspiracy - "Legitimo modo acquietatus" necessary - not so in this action - 9 Co 56 a Bro 205 10 Mod 209 2 TR 231 - Hob 267 - 1 Str 114 - That - "Pltff was discharged from prison" not sufficient -

But the omission to shew that the prosecu = = tion is at an end is cured by verdict - 1 Saund 228. Esp 532 -

p 2. No civil action lies vs Judges of Record, jurors or grandjurors, for even malicious acts done in the regular exercise of their judicial powers 1 Com 158. Esp 635 - 1 TR 503 - 513 - 14 - 534 - 5 - 537 - 8. Comp 161 - 172 - 1 How 191 - 2 Rev Ths & L 328. 2 Bl 1141 - 12 Co 23 - 4 - 12 Mod 219. See Co E 130. "False Imprisonment" - 2 - a rule of public policy to guard their independence in judging & to protect them vs vexation -

The legal presumption of their integrity can not be questioned in a court of justice - It is as strong as that of the integrity of any other tribunal - Ex A judge of record awards punishment on an insufficient indictment - A jury convict on insufficient evidence no civil remedy in either -

Malicious Prosecution.

Malice must be & generally is inferred from the want of probable cause 4 Dac 1974 - But want of probable cause can not be inferred from the most express malice - 1 T R 544 - Esp 529 - If no probable cause appears in proof; it must be presumed that the prosecutor had none - & of course he acted maliciously - But e contra - probable or even actual guilt may be prosecuted from a malicious motive; & the Law justifies the prosecution in both cases - For where the act is right the Law never enquires into motives

(33)

But Plff is at liberty to prove actual malice Always advantageous - To prove malice Plff may give in evidence - collateral circumstances as an advertisement by Deft; that the indictment was found - Malicious declarations &c - Esp 535 Str 691 - in short any evidence of malice is any thing which conduces to prove it -

Conviction of the Plff in the original prosecution, by a competent jurisdiction is not only evidence but conclusive evidence of probable cause - Esp 529 - 1 Wils 232 - Tbot 267. 6 Mod 262-

Latter part of page 33 & page 34 being omitted by mistake is inserted after page 40.

Exception - Where the facts upon which the original prosecution was founded necessarily lie in the knowledge of the Deft himself, he must show probable cause: tho' grandjury found the indictment &c Bull 14 - Esp 536 - Ex - prosecution for robbing Deft - Contra Stark Ev - part 4 - p 914 - n - 9 East 362 -

And proof of the evidence given before the grandjury (When the former prosecution was

by indictment) is good evidence of probable cause - Bull 14 - Esp 535. 6 - 534 - 6 Mod 216 - & Deft's oath at the original trial, as to the existence of the crime charged is admitted if no other person was present at the time IE if there is no other evidence of the fact. Ex - supra, of prosecution for robbing Deft -

This rule is necessary to the protection of prosecutors: as Deft may have been the only witness of the fact which constitute probable cause admitted ex necessitate - 2 Ld - See Starkie supra -

35) The existence of probable cause in any given case is a mixed question; partly fact & partly Law. But what amounts to probable cause is a question of Law merely - IE Whether the circumstances alleged to prove probable cause exist, is a question of fact; but whether or not these circumstances amount in Law to a probable cause, is a question of Law - So that the fact being given, the inference is a conclusion of Law - 1 TR 545. Bull 14 - Esp 539 - 4 Starkie 914 -

The defence of probable cause being inconsistent with the general issue, must be pleaded specially & from last rule it follows, regularly, that Defts plea should show the circumstances & facts (i e the grounds of suspicion) on which he acted - Cro E 134 - Esp 533 - See ("Pleading" division "duplicity") For what amounts to probable cause being matter of Law, the particular facts which

constitute it in any given case must appear in the plea (note) how admissible under gen'l issue - 2 Phil Ev 115 - 12 Sal 161 - as disproving malice -

So it seems necessary for Deft - to show that the crime for which he prosecution was committed by some one (Secus, semb, there can be no probable cause) Esp 534 - 6 Mod 216 - 2 Raym 120 - Ex Deft believes his property to be stolen when it is not - Clinton v Hopkins Ct of Ex - 2 Rost 25 - 225 (Doug 359 4 Starkie 916 - contra semb, old rule not Law) -

So what amounts to malice is a question of Law - 2 Ld Ray 1493 - 1 TR 519 - cases cited 1 Wils 233 - i.e. - what in Law constitutes malice is a question of Law, but whether malice exists in any given case is in the first instance a mixed question distinction the same as above -

When the action is for a malicious prosecution for felony - a copy of the original record granted by the court - ✱ in which the trial was, is necessary to enable the Plff to recover - & the granting is discretionary Esp 534 - 1 Bl R 385. 1 Bac 61 - Where the crime charged is a misdemeanor only, such copy is not necessary (96) (✱ 2 Cains 202 contra. held copy sufficient - See 14 East 302 - 4 Sarpin 907 - (36)

Original production by clerk sufficient. there appear to be rules of mere practice. Qu - the reason of the distinction? -

Malicious Prosecution -

In the former case it is usual to deny the copy if it appears to the court in which it that there was probable ground for the prosecution - Carth 421 - 3 Bl 126 - Esp 534 -

II. When the action lies for a groundless civil suit or a vexatious Law suit -

Gen'l rule as laid down is that the action does not lie, for bringing a civil suit even tho' there is no right of action - because it is a claim of right - Pltff is amerciable, pro falso clamore, at Com. Law, & is now liable for costs (Ball 11 - Sal 13. 14 - Esp 525 - 1 Bos & P 205 - 10 Johns 106 - 2 Phil Ev 116 n) which are recovered by original Deft - So no damage presumed (Seen, for criminal prosecution) Like the case of words not in themselves actionable in Slander) The rule means only that in such cases, there is prima facie no cause of action -

Exception 1st When there is good cause of action in favor of one, & another having no authority sues & arrests the party liable the action lies - Esp 526 - Ball 12 - Sal 14 - The third person is a wrongdoer abusing the process of Law, to the (now) Pltffs injury.

(37). When pltff in the original suit having good cause of action, sues in a court not having cognizance, the action lies - But it is necessary that the Deft (the original Pltff) should have known that the court had not cognizance - Esp 526 - 2 Wils 302 -

Malicious prosecution.

Altho' no malice - For then no cost can be taxed

But if the wrong consists in arresting the Deft in the first action, is not his remedy an action of Trespass for False Imprisonment The process being void? See False Imp.t 11.12 & 13.15.) or is the distinction that action for malicious prosecution may be brought if malice can be proved & Trespass whether it can or not? —)

3.d If a person having no right or claim of right, & knowing it to be so sues another, for the purpose of vexation, he is liable 2 Wils 305 - 1 B & P. 388. 2 do 129 - 3 East 314 - No such case in the Old Books - Said that the action lies not in such cases - unless Deft in it is held to bail 2 Phil Ev. 116 n - Peters R 207 - If he is not liable to bail, the cost he recovers are considered it seems a sufficient compensation - Qu - Is this agreeable to principle - ? (vide infra 7.)

4.th If for such purpose he sues & holds to bail for a much greater sum than is due 1 Saund 228. Esp 525 - b - 1 Sid 424 - But the action will not lie in this case unless the Plff has been arrested & holden to excessive bail & compelled to procure such bail, or imprisoned for the want of it - Esp 526 - Bull 12 Secus no damage accruing from that cause & the original Plff had a right to sue for his demand - holding to reasonable bail is no injury, when there is a cause of action -

Malicious Prosecution.

5. When the malicious proceeding complained of, is on final process & utterly groundless, & known to be so, by the original pltff, tho' no arrest of the person, but merely property taken action clearly lies - Esp 527 - Cx - Deft sued out a second fi: fa: & sold pltffs goods under it, after having taken other goods under former fi: fa: Action lay for vexation & damage Hob 205: 266 - Good law Bull 12 - Here the proceeding supposed being on final process no costs could be recovered upon it by the party injured.

(38) The particular grievance, or injury, must in general be stated, when founded on former civil prosecution - & that it was done "ma= liciously" & with intent to injure & oppress the pltff - 2 Wils 205 Esp 532. 1 Sal 14 1 Lid 424 - 2 Ld Ray 380 - So on purpose "to hold Pltff to bail" if that is the injury Sal 15 - Bull 12 No damage being presumed (ante) Hence in all cases in general. When the original prosecution was civil, it is necessary that special damage be laid & proved - 1 Sal 14. 15. 2 Ld Ray 374 - When the original prosecution was criminal (it being malicious & without probable cause) damage is presumed, especial=ly as no costs are recoverable, in such cases by the party prosecuted.

Seem if a stranger incites A to bring a groundless action vs B - No special damage necessary as vs him - not a claim of right by him - he not answerable Sal 14 2 Ld Ray 380 - Nor liable to costs -

(3f)

Malicious Prosecution -

Two requisites in all cases to support this action - for a civil suit - 1st. Former action determined & ended, For it cannot otherwise appear to have been groundless - or unjust Dong 205 - Sal 15 - (39)

2d. Damage (i.e. actual) already incurred or inevitable Esp 527 - 531 - Str 114 - Bull 13 - Therefore if one forge a bond in my name I can have no action till sued upon it - So if Plff in a judgment after having obtained satisfaction on a fi: fa: wrongfully obtains another execution, but has not proceeded with it -

But not necessary that the vexatious suit should have been decided in favor of the present Plff - That it is in any way ended, is sufficient, as regards the first requisite, above stated - Ex non-suit suffered on the original action - yet this lies - Esp 527 - Bull 13 - Any groundless proceeding by action when ended, is on this point sufficient - Esp 527

Our Stat gives an action vs all who "wittingly" & willingly wrong others by prosecuting any suit or with intent to trouble & vex & & treble damages - St. Com. 429 - It also subjects to fine of $7 - & for third offence to be proceeded vs as a common barrator - (Pt)

The mode in which the original prosecution was terminated must also be stated in the declaration - & correctly stated: If wrongfully alleged there will be a variance Ex - An allegation that Plff was 'acquitted' on the original prosecution is not sufi-

Malicious Prosecution -

= proved by evidence of a non: pros: for this is not an acquittal Dall 14 - Esp 536 - Sal 21 - 6 Mod 261 -

The declaration states all the proceedings in the original prosecution: & any mis= = recital in a material part of the in= = dictment & is fatal Esp 532 - 3 - 4 TR 590. Ex A variance between the origin= = al record & declaration, as to the day of acquittal &c 6 Mod 216 - Seem if it is in an immaterial part Esp 532 - 2 Bl R 1050 -

Two can not join in an action for a vexatious suit - the injuries being separate & personal Kirb 145 - Qu. Might not two joint merchants, or other partners who had been sued in a groundless malicious action, to their joint in= = jury in their trade? ("Slander" - 29)

(40). But there may be two or more defts Dall 5 1 Str 79 2 do 910 Esp 537 - It is a positive tort implying an act in which two or more may join -

Whether damages may be severed in this action vs several two cases contradictory Now can they be severed? The wrong is indivisible each guilty of the whole - (vide Assault & Battery 18) Esp 537 - Str 79 - 910 - Not severable by our practice Starkie 918.

Malice is a most material ingredient

Malicious Prosecution

in the damages recoverable in this action 4 Burr 1971 - Esp 537 -

Finis -

The following rules should have been inserted on page 33. immediately after this rule. " Conviction of the Pltff in the original prosecution by a competent jurisdiction is not only evidence but conclusive evidence of probable cause. Esp 529. 1 Wils 232. Rob 267 6 Mod 262 (See page

It is of course a decisive bar of the action for to deny probable cause here, would be to impugn the record of conviction -

Acquittal is in most cases (but not always) presumptive, tho' never more than presumptive of the want of probable cause; not conclusive because it may have been obtained from the absence of proof, in a case of actual guilt, or from a want of proof sufficient for a conviction, tho' there was sufficient to show probable cause - or from false testimony or other causes. But being in general presumptive evidence, it throws the burden of proving probable cause on Deft to prove probable cause in most cases - Esp 520. 1 Wils 232. 2 Ld. Starkie Ev part 4 - p 913 - " Tit Mal. Pros 9 East p 361 - 1 Mod 12 2 Johns 203 -

So acquittal on a defect in original proceeding, is generally presumptive evidence of want of probable cause 4 TR 247. Sal 15 pl 5. 2 Ld. Whether ignoramus found is primâ facie evidence of want of probable cause? (34)

Acquittal not always primâ facie evidence of want of probable cause, Ex - If the Pltff was bound over by a

Malicious Prosecution.

court of enquiry, or a bill of indictment vs him was found, by a grand jury. this is primâ facie evidence of probable cause. & the onus probandi lies on plff, the acquitted on the trial. Esp 536. Bull 14. Sal 15. So if it appears (i.e if it is inferrable) from the report of the judge that there was probable cause Bull 14. Esp 529, 30. But plff is at liberty to rebut the presumption in these cases. See 1 Esp Cases.

Exception. When the facts upon which the original prosecution was founded, necessarily lie in the knowledge &c &c See page 33.

See p 33.

Trespass to Things Personal.

Trespass in its most extensive acceptation, at Com. Law, is any transgression of Law, short of Treason, Felony or Misprision of Treason or Felony. When not considered as a word of technical import, it is any violation of any Law. 3 Bl 208 Saunders Dictionary - 5 Bac 157. ('47)

The word used in Law, in its comprehensive sense, denotes any wrong committed with force to the injury of another person or property. Esp 380. 5 Chn 574. In this sense I am now about to treat of it.

The class of Trespasses now about to be considered, comprise all practicable injuries to the personal property of another. Esp 380 (For Trespass to: see Battery & ante) To Real Property see Tr: qu: cl: fr:)

The rights of Personal Property in possession are liable to two species of injury.
1st. Abuse or damage, while the possession of the owner continues 2. Amotion or Deprivation of possession - 3 Bl 145.

I. Of abuse or of personal property, without altering the possession - Ex - poisoning one's cattle, killing his beasts - destroying his goods or doing any act in general, which takes away from the value of a chattel, falls under this description of injury - 3 Bl 153.

The remedy in these cases, where the act is accompanied with force & is immediately injurious, is by the action of Trespass vi & armis 3 Bl 153 - 5 Com 582 - 3 Roll 550 - C 17.

Trespass to Personal Property.

Sep 598.

But this action lies for such immediate injuries. Where a remedy is sought for remote, or consequential damage, occasioned by a tortious act, the proper form of action is Trespass on the Case - Ex - A cast a rock into the highway & in doing it wounds B or his horse - Trespass lies - But if after it is so cast - B drives his horse, or carriage over it, & injures the one or the other, Case lies -

If case is brought when trespass is the proper remedy, the declaration is radically ill judgment arrested, & vice versa. 6 T R 125 Cro Ch 141 - or 196 - 12 Mod 131 - Reason - the difference of judgment required at Com: Law in the case of an injury committed, with or without force (Trespass or Case).

III. Of Amotion or Deprivation of Possession

This species of injury so far as it is remediable by the action of trespass (vi & armis) consists chiefly in an unlawful taking (an unlawful detainer being generally remedied by detinue or trover (which see) 3 Bl 152. Mere detainer of property being only a continuance of one's possession & therefore not a forcible act -

(49) The action of trespass vi & armis gives damages not a restitution of in specie - 3 Bl 151 - It lies not for wrongfully taking a ship or goods as prize tho' the property has been adjudged to be no prize: For the question depends upon the 49

Trespass to Personal Property.

Law of Nations - And is triable in admiralty Cours only. Comy 572 - 598. (See False Imprison.t)

But in some instances where the original taking is lawful - trespass lies for subsequent injuries - Cep 381- E2 - If a beast is taken as an estray & afterwards tormented: Trespass for the original taking - as an illegal & forcible act - Dept is a trespasser ab initio - Cro J 147- 1 Ro R 12 - 8 Co 146- 5 Co 580-1- 3 Wils 20. In most cases trespass lies not (where the Defts original possession is law=ful) for a subsequent abuse of the property.

Rule - When the authority to do the original act (as to take poss.n of another's goods) is given by Law. a subsequent forcible abuse of the authority makes one a Trespasser ab initio - Cep 388- 405. 5 Co 581-2 - Roll 81- 2 Bl R 1281- 5 Bac 161- 8 Co 146- a - b - 2 Roll 561- Yelo 96-7 1 Bac 36- 3 Wils 20 - 1 Dun 20. So if a traveller enters a Tavern & afterwards steals &c, he is a trespasser (by relation) in entering 8 Co 146- So if a Shff. having seized goods on execution should destroy them, or use them wrongfully in such cases the subsequent wrong, operates retroactively & renders the original act a trespass -

Principle - The subsequent wrong extinguish=-es the license of the Law; & the wrongdoer is deemed to have done the originall act, not for the purpose for which the law permits it; but for the purpose of committing the subsequent wrong.

But the subsequent abuse of the authority

thus given by law must, (to make one a trespasser by relation) be positive - a misfeasance - not a nonfeasance. Ex - case of a tavern keeper - where theft stole - But he would not have been a trespasser ab initio - for refusing to pay the tavern-keeper for entertainment (Esp 383. 5 Bac 161 - 8 Co 146 b 2 Bulst 312. nor for a wrong not forcible. The act which makes one a trespasser by relation must itself be a trespass.

Hence if one having taken a distress lawfully refuses to deliver it back, on tender of sufficient amends, this does not make him a trespasser ab initio, the wrong being only a nonfeasance 5 Com 581. 2 Roll 550 - b Hence the injury is remedied by case. 1 Roll R 130 -

But if a Sheriff having taken one's goods or person on lawful process does not make return of the writ, which by Law he ought to do it (Ex in case of mere process.) he is liable in trespass: tho' he does no subsequent unlawful act 5 Com 581. 2 Roll 563 - C15. 20 5 Bac 162. (ante 19 for the reason) The doctrine of relation however does not apply, as the act cannot appear to have been originally lawful - The process not returned can not be given in evidence! So that the Sheriff's right to take cannot be proved This therefore is no exception to the general rule - See Ld Raym. 632 - Salk 409.

51) But where the owner of property gives the licence under which the original act was done, the other can never in general be made a trespasser by

relation - Perkins § 191 - 2 Roll 561 - 8 Co 146 b yelv 96-7.
For tho' the Law will punish in case of abuse, the very act which was authorized by itself; yet it will not allow a party to treat that as unlawful which he himself made originally lawful - 5 Bac 162 pl 22 Ex - Unlawful detainer or abuse by bailee &c 5 Com 581 - Cont. Rule in C. denied 5 Bac 162 pl 20)

If indeed the bailee destroy the thing bailed; Trespass lies! For he extinguishes the bailment - But is he trespasser ab initio? Lett § 71 - Co L 57 a 5 Co 13 b - Mo 248. 5 Bac 166 - Ex: is he liable for the original taking? or only for the act of destruction? It seems to be according to the theory of the rule, that the original contract of bailment is extinguished, or the original possession rendered unlawful, & if so he is made a trespasser by relation "Trover 52".

Who can have the action? To maintain this action Plff must have poss.n at the time of the injury done - property alone is not sufficient - For trespass is founded on possession 6 Sh 383 - 4 T R 489. 1 do 480. 7 do 9 - (See "Bailm.t" & "Trover")
Therefore if Bailee converts the goods bailed, trespass will not regularly lie -

Bare constructive possession as in a stranger is sufficient 5 Com 577 - 8. 5 Bac 164 - 2 Roll 564 & 1 T R 480 4 do 489 - 7 do 9 - Ex - goods in possession of one's servant, or depositary, or carrier, wrongfully taken or destroyed by a stranger. (52)

To formally any person having the general pro-

Trespass to Things Personal.

- perty & the right of present possession may, as
as a stranger maintain trespass - For it draws
to itself a poss.n in Law; as a stranger (not
as a Bailee; as he has actual & rightful poss.n
ession) 5 Bac 164. 5 Com 578. Latch 214 2 Bulst
268. 1 Sid 438. 2 Roll 569 it a constructive
poss.n which consists in a right of present
poss.n Trover 55 "Bailment" -

The personal property contemplated by this
rule must be accompanied with a right
of present poss.n as in case of bailment to
keep finding &c But it is held that case
lies for Bailee. tho' the exclusive right of
possession is in Bailee, at the time of the
injury 2 Ch R 167 - 3 Lev 289 - 359 - 2 Phil
Ev. 933-4 - 8 Johns 432 - 11 do 385. 4 TR 489
1 do 480 7 do 9. 6 East 383 "Trover" 55.

Trespass is said to be founded on Plff's possession
(at the time of the wrong done) and Trover
upon property or interest in 7 TR 9 -
Esp 576 - Bull 35. But this distinction holds
in point of fact only when Defts original
poss.n is lawful as between bailor & bailee
owner & finder &c 7 TR 487. 1 do 480. 7 do 9
(vid. explanation Trover 57) - Aliter where
Defts original poss.n is unlawful - There
owner may have Trespass or Trover - (Ex o)
in point of form Plff in trover is supposed
out of poss.n at the time of injury: Aliter
in trespass "Replevin" 19 -

(53) So he who has special property in goods
with the actual poss.n may bring trespass
as stranger 5 Bac 164 - F N B. 89. 92. Co Lit-

Trespass to Personal Property.

89. 4 Co 84. 2 Roll 551. 569 Ayliffe re (Same generally as in Trover) Bailor or Bailee may either maintain the action 2 Saund 47

If Bailee delivers the goods to a stranger the bailor cannot maintain trespass vs the latter for receiving them; tho' he may trover 5 Bac 164 pl 18 175 pl 30 - i.e after demand, for the original receipt of the property was not tortious.

If property is sold or given to one, he may maintain trespass vs stranger before he has taken actual possession 5 Bac 164 - Latch 214 - pl 10. for property draws a poss.n in Law, where there is no interfering right (i.e constructive poss.n as vs strangers) But as vs vendor or donor's detaining it the remedy would be Trover founded on property. their original possession being lawful

If goods of Testator are taken away before will is proved Executor may maintain Trespass after proving the Will - 5 Bac 164. 2 Bulst 268. 1 Str 480 He has by relation a constructive poss.n from Testator's death - his right is from the will not the probate. The latter is only evidence of his right -

So Legatee of Specific goods may maintain trespass for taking after Ex's assent tho' it be before delivery to him by Ex.r. 5 Bac 164. (Aliter if the legacy had been of "a third part" of Testator's goods - not

specific for no particular goods, as his) and in the first case trespass would not lie, I conclude, if the taking was before Exec.n assent to the Legacy. 1 TR 480. As without such assent he has not the Legal title in fact: nor does the assent transfer it by relation - For the Exec.rs assent is not evidence of prior legal title but confers & creates it -

So if trespass is brought for goods taken belonging to two - both should join but the non joinder of one is pleadable in abatement only. 1 Com 12. Tal 4. 32 3 Lev 354 - 1 Roll 31 - Ezk 401 - 586. Litt § 323 - Str 820. The objection does not support the general issue - nor go at all to the action - but only to the manner of bringing it i.e. the writ. It is good evidence under the issue (general) to mitigate damages -

At Com. Law Trespass does not lie for an act amounting to Felony: as Robbery, grand larceny &c by reason of merger of the civil injury in the public offence. 5 Com 582. 5 TR 5 Bac 176 - Lev 21 - 47 - 1 Com 130. Yelv 90. 1 Sid 375. 2 Roll 557. 1 Mod 283 1 Leon 148. Latch 144. Noy 82. No such principle here merger founded in forfeiture. Scott 2n. Str 873 - L.d Raym 1572 3 TR 176 Ay.to Con - Bull 131 -

If Plff or under Plff takes the goods of one on execution or another, both

are liable to this action in the latter case - as the Staff is in the former Doug 40.

In declaring the goods must be described with convenient certainty Esp 405. 6. "divers goods" or "Plff's goods" not sufficient nor cured by verdict - for one recovery would not be a bar to another - & Deft could not justify - 2 Ld Raym 1410. 4 Burr 2455. Str 87 - 5 Co 35. Besides Deft should have notice, for what goods he is sued. "Seven pieces of Linen" "2 sheaves of corn" held insufficient "Ship & sails" a "library of book," held sufficient - 3 Bac 273 - 4 do 24 - "Pleading" 18 -

But this applies only when the action is founded on the taking of, or injury to the goods themselves but whether the injury is laid by way of aggravation that "Plffs goods" formally is sufficient Ex "Trespass for breaking & entering Plff's house & spoiling his goods" is sufficient - Esp 406 - 3 Wils 292 -

Good even on special demurrer - Injury to the goods being only aggravation Neither of the reasons in the last case apply to this -

Trespass for breaking & entering a house destroying goods & expelling Plff. "Expelling" & destroying only aggravation unless Plff make a new assignment of it as a substantial trespass (case of mere assignment) 1 Bos & Pul 230 13 TR 292

Trespass to Personal Property.

1 Ab 555. 1 Vent 211 - 217. 2 Wils 313 - 3 do 20 4 Bac 12 - Without such new assignment & justification of the entering answers the whole wrong. See Pleading (Special Plea)

(50) - So, a general description is sufficient if it is made particular by reference to other things in the declaration Cro 406 - Ex 'Several keys for opening the doors of the house aforesaid'. Sal 643. 1 Vent 114

Plff must state posn. or a property showing a right of posn. at the time of the injury done i.e either an actual or constructive posn. Cro 406. 383. Sal 640 Cro J 46 - 4 Mo 490. 1 do 480 2 Lev 156.
Taking "hay from Plff's land" not sufficient - Taking a "horse from Plff's person" held not sufficient - "Plff's horse" instead of 'a horse' would have been sufficient - The latter would have be stating in effect a lawful possession the former is not. The horse might have been stolen 'From' 56 - Declaration in these cases not good even after verdict -

(51) Value must be stated Cro 407 - 5 Bac 196 - 1 Sid 39 2 Lev 230. Cro J 129. 5 Com 349. 2 Vent 176 (Cro 587 - 8. that value need not be alleged in Trover not correct. as 'From' 17. 1 Vent 114. 317 -

Omitting assessment of value cured by verdict Cro 407 - 5 Bac 196 - 1 Sid 39 - 4 Bac 2455. aqs. but Cro J 129 -

Trespass to Personal Property.

Pendency of another action by the same party or parties, for the same trespass is a good plea in abatement. 5 Co 61. 1 Com 49. 50. 110. 1 Bac 13. Carth 96. Semb if the other action for the same trespass is vs a stranger. Com 50. Hob 138. 4 Bac 48-9. 5 do 192. pl 15. Str 420.

But the judg.t first recovered in either will bar the other. Co J 73. Str 1178. Esp 593. (vid Grover 60) - where the opin= =ions vs this rule are referred to.)

Day laid not material. Pltff may prove the trep. at any time #. Esp 407 415. 319-21. Bull 17. L.d Ray 231. Co E 283a Co E 32. Hob 104. Therefore if a release is pleaded, deft must traverse as to the subsequent time. Esp 415. See 5 Bac 186-7. Balst 38. Hob 114.

#. According to Conn.t practice at any time, not within the Stat of Limitation. As the Stat. is a good defence under the general issue, by the provision of our Stat of Pleading. In Eng.d the Stat of Limit.ns must always be pleaded. See Pleadings 18-9. & (Plea to Assumpsit)

Pltff by way of aggravating damages may lay in his declaration, things for which he could not have an action. Esp 407. F N B. 196 Sal 119. 1 Str 61. 1 Ket 787. See "Plead" 19. Semb it to aggravate damages? ("Assault & Battery") Esp 317. Sal 642. L.d Ray 1032 or Beating his servants &c it is really only

(58.

Trespass to Personal Property.

showing the manner & circumstances of the act -

If trespass is committed by several, Pltff may declare vs one or more, or all - So he may vs each one separately - 5 Bac 192-3 - Str 420 (As to recovering damages see "Battery" 18) -

But it is said that at Com: Law, if it appears from the declaration, that the Deft with another person certain (i.e. known) committed the trespass the declaration is ill, for not joining the latter 5 Bac 192-3 S C 1 Leon 41 - Hob 199 - (2n as to the principle (It is aided however by Stat 18 Eliz) Torts being several - and Defts' pleading & showing the fact, it is agreed, does not hurt the cause - Str 420 - Hob 199 -

If on a Judgt in Trespass vs several one is compelled to pay the whole, he can not oblige the other to contribute rule common to all torts - Hard 164 & Tr 186 - Kirt 116 - The Law will not raise a promise out of an illegal transaction between the parties to it - "Assumpsit" 17 - "Battery" 20 -

59. Justification must be pleaded specially - Cro 411 - Co L 282 - Str 61 - Such defence being inconsistent with the gen'l issue - If justification pleaded by one of several Co-Defts, shows that upon the whole Pltff had no cause

Trespass to Personal Property.

of action - judg.t cannot go vs either even if one is defaulted or found guilty - Ech 421 - 1 Sir 610. Hob 54 - 2 Ld Ray 1372 - Or a license - Gift Release & pleaded by one Deft & the other found guilty or defaulted, or demurs to a good declaration or pleads a false plea found vs him -

By the Com: Law "vi & armis" are words of substance - For at Com: Law the judg.t vs Deft in case of forcible injury was a Capias pro fine - in other cases the Judg.t was Misericordia - 4 Bac 11 - In one a fine - in the other amercement 8 Co 39 a - Omission alters the judg.t Ech 408. 5 Bac 191 - F N B 196 - Sal 636 - Cro E 407 Cro J 443 - 526 - 536 - (Trespass on case 2)

Now the writ of capias pro fine is taken away by Stat. 5 Ho & M - But the Pltff pays & institute in signing judg.t in actions for injuries with force; & recovers it back in his judg.t from the Deft (vid s. 8) - Therefore a reason for the rule continues 5 Bac 191 - Sal 636 - Ld Ray 985. Com: & the distinction must still be preserved to let in the provisions of the Stat -

So "contra pacem" are words of substance at Com: Law 5 Bac 192. Ech 408. F N B 93 - Carth 60 - Sal 636 - Cro J 426 - 443 - for same reason as in last rule (30)

The Objects are both now aided by

Trespass to Personal Property.

verdict & shall be amended (Esh 408 Sal 640) by Stat of 16 & 17 Car II. 1 Bac 93-4

In Con.t they always have been regarded as matters of form - The Com: Law reason for considering vi & armis, as substance, never existed here - No such diversity of judgments - Neither capiatur nor misericordia -

At Com Law. a joinder, in the same declaration of trespass on the case, would be ill, because different judg.t would be necessary on the two counts 8 Co 39. And held dif=ferent in Con.t but not now con=sidered as Law here. It would destroy all distinction between different forms & kinds of actions -

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(1) Replevin has been defined to be a redelivery to the owner by Legal process of his cattle or goods distrained. 4 Bac 372. 6 Ch 346. Co Lit 145 b) for any cause on his giving security to try the right of the distress & to redeliver if judg. be against him. Action of Replevin then is one by which such redelivery is effected.

"Distress is the taking of a personal chattel out of the possession of a wrongdoer # (or person in default) into the custody of the party injured to procure satisfaction of the wrong."
It is the act of the party injured 3 Bl 6. Sometimes signifies the thing taken by distress. (# Wrong-doer here does not mean merely a tort-feasor but includes several descriptions of persons who are in fault for not discharging debts or duties.)

Replevin lies not it is said for goods taken by mere trespassing act. 6 TR 522 Bull 53. 3 Bl 146. Str 1184. 17 Wils 372. But for such only as have been taken by distress i.e. it lies not for any taking which is not in form or professedly an act of distraining. Tho' the latter in point of fact be utterly tortious (Ch 18) This is laid down as a Comm Law Rule. But by Stat the action may lie in other cases, than that of distress (as in this state it does) And by other Com: Law authorities, it appears that Replevin will lie for any tortious taking. 7 Johns 140. Bull 52 Com Rep a 1 Schat & Lafroy 320-1. 327. Roll. Replevin B Cro E 824. 1 Mad Ch 20 Com. Action m 6.

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The latter opinions seem to be the better & more reasonable. Suppose an heir-loom family portrait be tortiously taken or with= =held. Can there be no specific remedy? That by the action of detinue is precarious & inadequate

Writ not granted but upon security given by Plff to try the right of the distrainer &c. & in Engd. to redeliver the property if judgt. is for distrainor. 3 Bl 13. 147. Co Lit 145 Ech 347 8.

In Connt. the security upon a writ of Replevin is a substitute for the property re= =plevied. It obliges the Bondsman to re= =spond in damages merely & the property is not redelivered to the distrainor in any event. Stat Connt. 360. 52

In Engd. if Plff in replevin does not try the right (i.e. does not pursue his action) or fails in it; the property is to be returned to distrainor who may have a writ de retorno habendo Co Lit 145. 4 Bac 382. 372-3 n b. It being returned to distrainor he may keep it till tender of sufficient a= =mends: no longer. 3 Bl 147 158. 8 Co 147 a Ech 377

Tender of sufficient amends before dis= =t.ss. makes the distress tortious. For dis.ss is but the means of obtaining se= =curity for some debt, duty or satis= =faction of damage done. If before impounding it makes the impounding

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or detaining tortious - but not the taking & Co 147 a Bull 60. If after judg.t for distrainor it makes the further distrain= =er by him unlawful & supra Sep 357 2 Sid 40. 5 Co 76 a 2 Roll 561 - & in the last two cases plff may have detinue or I suppose Trover - 8 Co 147 a.

When distress is taken it is to be im= =pounded - inanimate chattels in a pound covert - animals generally in a pound overt - 3 Bl 12 - Co Lit 47. We have no pound covert -

(3) At Com: Law a distress being in na= =ture of a pledge, it could not generally be sold - the distrainor could only keep it, as a punishment to the owner if he was stubborn - 3 Bl 10. 14. 1 Bulst 588 Statutes have in a great measure re= =medied this inconvenience - especially in case of distress for rent - by allow= =ing a sale in certain cases! but not in case of cattle taken damage fea= =sant 3 Bl 10. 13. 14 - & some other cases There were always some exceptions to the general Com: Law Rule - 3 Bl 14 - 8 Co 41 - 12 Mod 330.

Writ of Replevin is demandable, as a matter of right - & even tho' rent is granted with right of distress irreple= =viable 4 Bac 573 - Co Lit 145 - This rule is designed to guard to oppression -

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The principal cases by which distress may be taken by Com: Law are two - 1. In case of cattle damage feasant 2. For non payment of rent (The second not in use here 2 Lev 89) 3 Bl 6.7. Co L 46 Ecp 364 to 355. In Eng. there are certain other cases Ex - neglecting suit - or service under certain feudal tenures - for amercements, tolls, poor rates &c 3 Bl 6.7. Co Lit 46. Ecp ut supra -

In Eng. Replevin may be at Com: Law (4)
by a writ out of Chancery or under the Stat of Marlbridge 52 Hen 3. by plaint (Ecp 340) i.e. Shff's own precept on com: = plaint made - So Shff may order his Bailiff to Replevy Ecp 247. F N B 169 -

In Eng. writ of replevin lies in all cases, I believe, in which distress is taken except when distress is founded on a capias in withernam - This is a distress by the owner of the original distress, when the latter is carried out of the county or concealed - In which case the Shff has: = ing returned the goods are elongued - i.e. carried to a distance - to a place unknown, the owner may distrain the goods of the distrainer, by way of reprisal, & these are not replevisable

It obtains also when the original dis: = trainor having retained the goods by the writ of replevin, on a claim that they are his own (which claim is decided by concealing them &c ut supra: so if there is

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no claim, but the property is concealed or 3 Bl 149 F N B 69-73- 7 Ba 475- In these cases there can be no replevin of the 2d distress - till the original distress is forthcoming

When a writ de retorno habendo is awarded & the distress can not be found Sci: fa: lies by the pleadings in the writ of replevin - 4 Bac 382 F N B 172- Ere 347. Cro C 322 See Ere 376- 2 Wils 41-

(5) I. In case of Replevin of cattle damage feasant - II. In case of goods attached

I. Of Replevin of cattle distrained, damage feasant - In this case the owner of the land has his election to bring trespass, or distrain & impound the cattle. But if he distrains & the distress escapes his action of trespass is gone - unless the escape was without his fault - 2 Sev 91-2 Same rule in case the cattle's dying 5 Bac 179- Sal 248 - 12 Mod 658 - 663 - 2d R 720 For he is bound by his election & must abide by the remedy he has chosen -

At Com: Law. the proceedings by replevin were tedious - the writ must issue out of chancery - the goods were thus long detained from the owner - By stat. of Marlbridge (52 Hen 3d.) The Sheriff is enabled to replevy immediately - 4 Bac 373 - 3 Bl 147. F N B 68-9. 13 Co 131 - taking pledges, that the party replevying will prosecute his action vs distrainer,

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& return the goods if the right is decided for distrainor. If he fails to prosecute, pledges liable to distrainor; Sci: fa: lies on the pledges on their recognizance Ech 347. 4 Bac 382. Co C 222 2 Wils 4.

Analogy between taking body of debtor & impounding cattle. Both are pledges - 2 Bac 354 Demand not satisfied by death - or by escape unless the party impounding is in fault for the escape, or consent to it - In both pledges being holden no other remedy - 5 Bac 179 - 12 Mod 103 -

In Eng.d owner of cattle distrained must provide for them, unless they are put into a pound covert - then distrainor must do it. 3 Bl 13 - Co Lit 47 -

If the owner replevies in this State & judg.t is given for Deft in replevin - he recovers in the action, for damage done by the cattle (2 Sw 91) & his execution for the amount of damages found instead of the writ de retorno habendo at Com: Law (ante 2) Co Lit 145 3 Bac 372-3 382 -

If the execution is not satisfied by pltff in replevin his pledges are liable.

The pound keeper has a lien on the cattle impounded for his fees, in case of settlement between the parties -

Generally when cattle enter through the insufficiency of the fence of the owner

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of the Land no damages are recoverable. But if they pass a good part of a fence partly good & partly bad damages are re= =coverable - & they may be impounded So if the cattle are unruly Stat of Con 311 -

So if they enter from the highway, imma= =terial at Com: Law whether the fence is good or bad (2 Bl 527) because it is unlawful to permit them to go at large in the highway -

But a Stat in Con.t enables towns to make any cattle commonable (Stat of Con.t 414. 408) - then it is said no difference between ent= =ering from highway & from an adjoining field i.e no damages recoverable, if the fence was insufficient. (2n - Whether such town regulation has any other effect than to prevent horses &c from being impounded for running at large on high= =ways?.

(9) - For mischief done by an animal from a disposition common to the species, owner is liable without notice or knowl= =edge. As for a bear biting - cattle tres= =passing - For that committed from a disposition not common owner not liable without science - Ez A's dog's biting - Treat on Cases 8. 9) Dy 25 - 29. Sep 605 L Ray 606 - (In declaring for damage done by a dog, by biting - scienter must be al= =leged. Cr Cl 350 -

If the owner of land chase a beast damage feasant on to the land of the owner of

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the beast; he is not liable for chasing - If a stranger chases he is liable to both. Latch 120. 5 Bac. 179.

Distrainer not allowed to use a beast distrained 3 Bl 13. Co J 148. He becomes a trespasser at initio if he does "Fresh: to Cers: Prop: 50)

So title to land may come in question (12)
in this action, it has been called (when this is the case) a real action - now holden to be personal as trespass or debt for land can not be recovered in it - Tho' title may come collaterally in ques= tion 4 Bac 373. Finch L 316 Cont 436. 47. 2. 27 -

Rule that all distress must be taken by day except in case of beasts damage fea= sant - In this latter case distress may be made by night lest they should es= cape - 3 Bl 11 - Esp 360 - Co Lit 142 - 161 - To prevent further damage, I suppose would be a sufficient reason for the exception The general rule is intended to guard vs the abuse of the license of the law, by fraud, or violence -

Distress of cattle damage feasant must (15)
be made while the beasts are on the land - Esp 360 - Co Lit 142 - 9 Co 22. So at Com: Law in case of distress for rent - except it might be taken on fresh suit Now remedied by Stat 3 Bl 11 - (It is a general rule where one has a lien on

goods & voluntarily lets it go - he loses all lien)

II. As to distrs for Rent. Formerly the landlord might take as large a distrs as he pleased. Tenant had no remedy - He now has by Stat of Marlbridge (52 Hen 3°) a special action on the case for excessive distrs - 3 Bl 12 - 3 Lev 48. 1 Vent 104 - Str 857 - But trespass is not maintainable for the injury (1 Burr 595) it being no injury at Com: Law. except when gold or silver (being of a certain known value) are distrained (?!) In other cases a special action on the case founded on the Stat - is the proper remedy - (6 Execution 8) -

Distrs for rent is incident of Com: right (according to the Com: Law) to those cases only in which the owner of the rent has the reversion - not when he has no future interest: as in case of rent charge &c. Where the owner of land conveys his whole interest - reserving a rent - Litt. § 215. 218. Co Lit 140. 3 - Ex parte 355 - 6 - 2 Bl 42 - But he may in this case have the right by clause of distrs -

(14). Now the right of distraining is (by Stat of 4 Geo II) extended to all rents - 2 Bl 43 3 ds 5 - Ex parte 355. 6 -

In some cases the writ de retorno &c is taken away & damages to dept in Replevin substituted in Eng. by Stat - Thus in case of distrs for rent by Stat of 17 Car II -

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If the deft in replevin prevails he recovers his costs & so much in damages as is equal to the value of the distress; if that is less than the rent due, he recovers in damages the amount of the rent with costs. In the first case distrainor may have a further distress 3 Bl 150. Bull 58. 3 T R 349. 2 H Bl 36 - See Cep 377 - 2 Wils 116 - The damages in this case are a substitute for the return of the goods -

2d. In case of personal property attached on mesne process -

The action when brought for goods attached is given by stat in this state - unknown to the Com: Law.

It is called a "mandatory precept" requiring the officer who has attached goods on mesne process to redeliver them See Kirb 276 -

Magistrate taking the bonds, acts ministerial (15)
ly, hence he is liable if bonds are in (16)
sufficient (but not if the bondsman is responsible at the time) and the action may be brought by him - tho' no previous suit has been brought by the pledgee if they can be proved to be insolvent. (Bull 60)

The action is Case as by Shff in Eng.
when he takes the pledges - Bull 60 -

He becomes liable in this case for the whole debt I concur (infra) as in Eng. Shff. does - even over the amount of the

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bond taken as the case may be -
See 8 Tr 28. 17 N Bl 76 - Comp 71 - (2 N Bl 54)
cont) 2 N Bl 36 - See case in N Bl stronger
than similar case here - Bond in Eng.
being for the return of the goods - Ech 348.
Dany 336 - 4 Tr 433 - (cont 2 N Bl 54)
The action is case Ball 60.
(17) Bond in Eng. is double the value of the goods
Ball 10. 2 N Bl 36 -

It has been a question in Con.t whether
pltff's bond (i.e the pltff's in Replevin)
might be taken by the magistrate -
decided in the Court of Errors that it
cannot) At least that magistrate is
liable on pltff's failure tho' responsible
when the bond was taken - Rev 165 -

It has also been questioned whether
when property to a small amount -
is attached & replevied the bondsman
is liable for more than the value of
the property - No decision in C.t But
the words of the Stat are explicit
to subject him to the amount of the
recovery - on the attachment - Ana-
-logy to the case of Receiptsman -
who is always liable for the whole un-
-less he delivers the property - or limits
the extent of his liability by the terms
of the receipt -

(18) It seems in Con.t bondsman cannot
discharge himself by surrendering the
goods after judg.t for deft in replevin
The delivery of the goods is no part of

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the condition of the bond - His under=
=taking is only to answer such damages
demands &c 1 Stat Con: Replevin - Not
like the case of receipt man - he is only bound
to deliver the goods on the execution - Not
like bondsman in English replevin - who
engages only for the return of the property.

It has been held here if property of one
is attached for the debt &c of another, re=
=plevin does not lie - But trespass does -
For replevin on attachment is not an
adversary suit - & no one can replevy
goods attached unless he is a party to the
suit - Kirt 276 - 2 Sw 93 - i.e. to the writ of
attachment - Sed qr. Since by many
opinions the action lies for a taking
merely tortious -

If cattle of a feme sole are distrained
& she marries - husband alone may re=
=plevy - for the property becomes hus=
=bands by intermarriage - For as the
distress gives a mere lien not altering
the property - It must be considered as
the property in possession - as contra=
=distinguished from property in action.

He has a right to possession on paying the
debt Ecp 375. 1 Sid 81-2 - Bull 53 - But if
wife joins it is good after verdict; for
the presumption will be that they were
joint tenants -

Executor may replevy distress taken from (19)
testator Ecp 375. 1 Sid 81-2 - Bull 53 - For

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the property & the right to it are presumed -

If the several goods of several persons are distrained together they can not join in replevin, the injuries being several Co Lit 145 b Esp 374 - Bull 53 - For their interests & rights are several

Goods distrained in a foreign country, tho' brought here, which under the distress cannot be replevied here - Esp 372 - 2 Show 91 - as the caption might be lawful there - It is not the reason that the cause of action or claim for which distresses are allowed at Com: Law are local & trans: on land debt for rent &c (See p. 3)

Replevin lies of things personal only, & therefore it is said not of deeds of land - It is a sufficient reason that deeds of any kind are not distrainable provided replevin lies not for taking merely tortious But qu. as to the rule if replevin lies for such a taking (p.) and trover lies for such deed Trover 62 Esp 372 4 Bac 385.

Replevin is founded on the right i.e. on the property in the plff - Therefore it is a good plea in abatement - or in bar, that the property is in a stranger - Esp 352 - 4 Bac 373 - Lev 92 - Carth 74 - 243 - Sal 94 - Different from action of trespass (Bull 53) where plffs possession is sufficient - trespass being founded on possession. Vid - Trespass 52 & Trover 57 -

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Pleadings -

From p. 9.

Declaration charges the taking & detaining of the goods &c & demands damages 2 Ch P. 364 - Com Plead. 3 d 10
2 Saund 194 a 292 - 310. 320 n. 1 -

In Replevin Deft may either deny the taking or show his right to take - 4 Bac 388. But on our Stat replevin of goods taken by attachment there is no trial (p 14 & alt)

From p. 10

The gen'l issue is - non cepit - 1 Ld. Ent 249. 4 Bac 388. Bull 54 - Upon this issue a claim of property in Deft can not be given in evidence - it should be pleaded - Bull 54 - Sal 5 - 2 Lev 92 - 6 Mod 81 - Such claim being inconsistent with the gen'l issue -

If Deft justifies the taking - as because the beasts were damage feasant &c! he is called the avowant (Esp 360. 3 Bl 150. 2 Saund 195) if he justifies in his own right, or in that of his wife - If he justifies in the right of another (as servant &c) he is said to make cognizance - 3 Bl 150 -

These terms are derived from the words of the justification in two cases - Ex 1 - "Deft will avow the taking" &c 2. Deft as serv't &c will acknowledge the taking
Avowry is in the nature of a plea to the action of replevin, & also of a declaration as plff in replevin - The replication is in the nature of a plea to the avowry & is usually so called -

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In this case (ie of avowry &c) both parties are actors ie pltffs - The owner of the cattle suing for damages & the avowant claiming at Com: Law generally a return of the cattle &c. in some cases (p14) damages - 4 Bac 373 - 2 Mod 149 - Cro E 798. Ball 81 - 3 BL 130-1 - So that both parties claim a right of recovery - a peculiarity in this action -

Com. 11 - In Ct. both claim damages only: The cattle being here not returned in any event to the distrainor -

Avowry is in the nature of a declaration in several respects - 1 Avowants right to judt. for the return of the distress & in some cases for damages - In other words Deft prays a judt. in chief 4 Bac 373 - Esh 376-7 - 2 Wils 117 - Salk 95. 2. Pltff may plead in abatement of the avowry 4 Bac 373 - 3. Avowant need not close with a verification - Cro E 530. 798. Cawt 122 - 4 Bac 373 - 6 Mod 183 - Plead 263 - Felo 148. In these particulars the avowry is like a declaration -
But the avowry is in nature of an action one tenant in common may it is said avow without his fellow. (Cro E 530. 4 Bac 373 - Esh 374 -) For taking cattle damage feasant - But this is overruled - He must make cognizance as bailiff of the other. (Ow Jones 253 - 2 Ve BL 386 - 1 Roll 220 pl 14) as well as avow for himself -

Tenants in Com may have several a-

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- vowries (i.e. avow severally) for rent - because it is in the reality & their interests are several - 2 H BL 387 arg.^d Carth 340 - Sal 389. Ld Ray 422 -

Trespass on the Case ex delicto -

This action lies.

I. For wrongful acts not accompanied with force - (1)

II. For culpable neglects or omissions Bull 74

III. For consequential injuries occasioned by acts which are forcible.

Examples of the first kind of wrongs - Conversion in Trover, Malicious prosecution, Volunteering Escape, Slander, Fraud, False Return, Mala praxis &c -

Examples of the second kind of wrongs. Neglect of duty in a Bailee, Servant, Officer &c when injurious to another -

Examples of the third kind of wrongs - which consist in consequential damage, occasioned by forcible acts & are laid in declaring under the per quod is an allegation of special damage - 3 BL 122-3 - Esp 598. 11 Mod 180 L Ray 1399 - 1402 - 2 BL R 895 - 3 BL 153-4 - 208-9 Esp 645. 2 TR 167 - As - throwing a log into the road over which one falls, digging a pit there &c - Str 636. loss of service &c in consequence of beating one's servant: tho' the action of trespass with a per quod has by confounding the forms of declaring obtained very generally in the English practice - Not in Ours - (part)

Actions of trespass on the case are generally founded on the Equity of the Stat of Westm. 2d. 13 Edw 1st - 3 Bacon's A & L 89. 243. 3 BL 51-2 - tho' case was in a few instances known at Com: Law 3 BL 123 - 2 TR 129. 3 BL 445. 2 Lev 20. (vid remedy for escape post 9 -

Trespass on Case ex delicto -

Assumpsit is the most comprehensive of all actions on contract & Trespass on the case ex delicto is the most comprehensive of all actions -

In Con.t the forms of declaring & common parlance often make a distinction between actions on the case & actions of trespass on the case - Assumpsit we call an action on the Case, Trover an action of Trespass on the case The first class arises ex contractu the second ex delicto - The English Law knows no such distinction 3 Revs. H & L. 245 or 394 or 3 BC 208. But the action denominated Trespass on the Case whether founded on contract or tort.

2. If Case is brought when Trespass is the proper remedy (action) judg.t is arrested & so e converso 6 JR 125. 2 Mod 131 - Cro C 141 & 196 - Difference of the judg.ts at Com. Law is the reason 5 Bac 191 - 3 4 do 11 - 2 do 506 - 'Trespass 59'

It has been a subject of much controversy in particular instances whether Trespass or Case is the proper Remedy. Where there is no force in the transaction complained of there is no difficulty to determine; it is always Case - When the original act causing the injury is with force Trespass vi & armis lies in some cases, & in others trespass on the case.

Rule. If the forcible act is immediately injurious, & the redress is sought for the immediate injury, Trespass vi & armis is the proper remedy, as battery of one's self, false imprisonment, destroying property with actual force &c - But if the injury for which redress is sought

Trespass or Case or deceit.

is consequential, Trespass on case seems to be the proper remedy or action - as for throwing a log into the way over which one falls - Loss of service from the battery of one's servant or child &c - (3 Bl 208-9. 8 TR 123-5. 153-4 - 5 do 648. 2 Bl R 1055. 1 Com 204 - 3 R & E L 244*) 2 Wils 313. Bul 26-79. Ld Ray 1399 - Str 634 - 2 Burr 1114 9 TR 23 7 Ray 407 - 2 Bl 892 In the last case the action is usually called trespass - & trespass is holden to be the proper action* - (2 N R 476) - Ld Ray 1032 . 1107 - Salk 380. 3 Bac 567 2 TR 167. Master & Servant 63 -

There has been much difficulty in applying the rule of discrimination i.e. in distinguishing between immediate & consequential damage - The injury or damage to be immediate within the rule need not be of course the instantaneous effect of the original force, tho' when it is so it is of course immediate - 2 Bl R 899-900

But injuries which are not the instantaneous effect of the original force are sometimes regarded as immediate, sometimes as consequential & of course they are in some cases remedied by trespass and in others by case. (3)

Rules.

1. When the immediate or proximate cause of the injury is but the continuance of the original force the injury is immediate & the author of the original force is liable in trespass for - in this case he is the author of the whole force, the ultimate violence is his, & the injury is considered in Law as the immediate effect of the original force -

Trespass on the Case ex delicto -

II. But where the original force ceases before the injury commences, (as is always the case when the injury is produced by the voluntary intervening act of another rational agent - & in many other instances) the injury is consequential & the author of the original force is liable (when liable at all) in Case only. For the proximate cause of the injury is not a continuance of the original force, hence the injury is not considered in Law as the immediate effect of the original force.

Examples of Rule I. A ball shot by A glances two times or more or less - & hits B. B's remedy vs A is, by the first rule, Trespass - A strikes a football & B kicks it against C C has no remedy against A, but trespass against B - by Rule I.

So one shoots a ball which after glancing a number of times hurts A's servant. The bodily hurt is in law the immediate effect of the original force, for the proximate cause or ultimate force is but a continuance of the original force. The original force being the causa causans - & the force proximate the causa causata. The servant has therefore Trespass by the First Rule.

But by the Second Rule A's injury is not the immediate effect of the original force The immediate cause of the injury to A is the causa causata viz the physical hurt done to the servant - A's proper remedy is therefore - Case - 2 TR 167-8. Esp 345. Sal 206 tho' it has been called trespass - Ld Ray 274

Trespass on Case ex delicto

831 - 3 Wils 18. 2 TR 167. 2 NR 446 to 476. 3 Ea 599 (p 21) And it is now settled in 2 NR 476 - that the Master may have trespass - this is plainly contrary to principle - tho upon precedent

Further Examples.

But if A puts an instrument of mischief in motion & another rational agent B vo- luntarily gives it a new impulse & it wounds C the injury is not the immediate effect of A's act but of B's. B therefore is liable in Trespass and A if at all * is liable in Case - 2 Bl R 892. * depends upon whether his act was in the 1st instance lawful (14)

Suppose a ball shot at a mark glances & wounds - trespass lies - Cutting thorns - lop- ping trees - 1 Ray 467 - 1 Mod 24 3 Ea 523 - In these cases the injury is the immediate phy- sical effect of the force continued, & is not aided by an intervening free agent - But if a log is thrown into the road & A falls over it case lies - for the injury is not the effect of the original force continued, the original force ceased before the injury began.

Cro J 446 - 1 Com 204 - 6 Ea 599 - 1 Cro E 10 -

So if A erects a spout which throws water in time of rain on B's Land - case lies - Str 630. (Post 6.20)

Same reason - Alter in cutting down a head of water & thus flooding B's land (p6) for here the injury is the immediate effect of cutting down the dam, & Trespass lies - So in Shepherd vs Scott 2 Bl R 892 - Squib case So of turning out a mad ox - (Pl & auth. supra)

Case lay 1 Vent 295. for riding a wild horse to which ran over pltff 1 Com 208. here 1

Trespass on the case & trover.

conclude defendant was not considered as an agent - so far as related to the force - 2 Lev 172 2 Bl R 899 - he was regarded as passive being unable to govern the horse, but guilty of imprudence & want of care in riding him 2 Str R 87 -

Dotts cart (he driving negligently) ran with force re against pltfs horse & case was adjudged a ill 2 N R 187 Not alleged as the act of the deft - in 3 East 593 - the declaration did not describe the force as the personal act of deft - 8 T R 188. If Declaration had charged the deft with negligently driving against pltfs horse trespass would have been the proper form of action, for if an injury is the immediate effect of force, its being negligent or wilful is immaterial as respects the form of action -

Yet if A carefully discharges a gun & the fire of the wadding is communicated to B's property & burns it - Case lies for B - Ow 6 10. for force ends before injury begins burning is not A's act. The burning is a new distinct act or cause - If wilfully - trespass would lie - in this case it seems the mischief being wilful or not decides the immediate cause of injury - i.e. the burning to be A's immediate act or not - If not wilful - the burning would not be deemed his act but only the consequence of it -

5) If I dig a trench on my own land & divert a water course from my neigh=

= bous, the injury is not immediate - & Case not Trespass lies - Here the proximate cause of the damage is negative viz the failure of the stream - therefore it is not a continuance of the original force - 2 Wils 174 - 6 East 638. Str 5. 638-9 -

If a servant in performing his Master's business negligently commits a direct injury with force, the remedy vs the servant is trespass. 2 Camp 464 - Master & Servt. 36. 39. Is Trespass or case the proper remedy against the Master? 1 Bos & Pul 472 - 6 TR 125. Lal 441 - 5 TR 649 1 Ea 100 2 H Bl 442. Case I think clearly. Str 1083 - 7 TR 279. 4 Burr 2093 -

Deft's ship ran over Plff's boat with force & by negligence of Deft's pilot - Case is the proper action - it is not the personal act of Deft but of his agent. 2 N R 446 - (pb)

This distinction has been taken - If A wilfully runs his vessel against B's trespass lies - if negligently case - but it was A's act in the former case - not so considered in the latter - 8 TR 188. 3 Ea 523 - in the latter case the court did not consider the act as A's act - Sed qu. If A stood his own vessel at the time of the injury -

In case put supra of cutting trees, lopping thorns &c (4) the force is continued, it is one conjoined act of force therefore trespass lies - Case of Spout (ut ante) aliter - for erecting the Spout does not cause the falling of the rain, not conjoined act - There the force

Trep: on the Case ex del -

ended before the injury took place - Neither sufficient cause is needed - Viz Rain to produce the injury - hence case is the proper remedy.

But for cutting down a head of water or the remedy is Trespass - for this is like pouring water on the Pltff's land, it is one continued act of force the cutting down causes the flowing of the water.

But the first general rule (or the first branch of the distinction) holds only as against the immediate agent, or actual author of the injury - As against his principal or employer the remedy is case, even where the injury is the immediate effect of force - Ex A's servant negligently driving his master's carriage against another's carriage or person - remedy against servant is Trespass: by the first general Rule - but against the Master it is Case: for in Law the act is not his - he is liable only on the score of negligence - 5 TR 649 - 6 do 125. 2 H Bl 442 - 1 Bos & P. 472 2 N R 446 - Str 1083 - 7 TR 279 - Sir Mass & Serv.t 37-8. 9 - 82 -

Where case lies for an injury accruing in consequence of an act with force the original act may be laid to have been done vi & armis, tho' the action is Case - 3 Reeve's H E L 244 - It is but matter of inducement or a description of the manner in which the consequential damage was occasioned

Trespass on the Case ex delicto.

occasioned - Ex Throwing a log into the highway & Pltff's horse or carriage injured by going over it.

Whether the original act was Lawful or not not the criterion as to the form of action 2 Bl R 892 &c / The injury being the immediate effect of the force or not, decides the form of action The unlawfulness of an act may render the author of it liable when he would not otherwise be so. but cannot affect the form of action -

This action lies for a great variety of mis= = feasances & non feasances - 1 Bac 44. 3 Bl 52 122. 1 Com 132. 224. Many of them form distinct titles - Trover, Slander - Malicious prosecution &c

A mere neglect for which this action lies, on the ground of delictum must be a neglect of duty imposed or recognized by Law. Esp 599. 2 Bac 917 1 P. Com 252. Cro E 219.

Thus for negligence in his office, to the damage of another, a Shff is liable, so are other officers & private persons in other cases 1 Com 206-7. 9 Esp 503. 1 Roll 93 - 2 Bac 366 - Sal 323. 1 Bos & Pul 360-

It lies vs an agent for not effecting insurance according to instruction, if a loss happens. on this ground it lies in three cases - 1.st Where a= gent has effects of the principle / who is abroad / in his hands 7 T.R 157. Park 303- 2d. Where one has been in the practice of insuring for another who is abroad & has given no notice to discontinue it - 3. When one accepts Bills of Lading sent on condition of

Case, Case or Tortious.

insuring - March Ins. 74. 205-6. 2 Str 188.

is or a voluntary agent (i.e. one who receives no reward) if he proceeds to execute the trust, & commits a mistake by negligence March Ins 206-7-9. 1 Esp Ca 74 - 2 Ld Ray See Bail^t 1582.

(8). A person performing business for another, in the line of his profession, & doing it carelessly or unskilfully, is liable in this action - But if the business was out of the Ref^d profession, he is not liable for want of skill - unless by a special agreement tho' for negligence he is - Ld Ray 214. 2 Wils 359. Esp 601 - Bailm^t. Thus for negligence or gross ignorance in a surgeon, by which a patient is injured this action lies - Esp 601 - Ld Ray 213 - 2 Wils 359. 8 East 348.

But in case of an undertaking in physic or surgery unless the person undertaking makes the practice of Physic or a common profession, he is not liable it is said by (Esp 601) even for neglect, without a special undertaking - 3 DC 122. 166 - Esp 601 Ld Ray 214 - 1 Com 165 - 235. Folly of the patient - See gpe In case of neglect - Espinasse's authorities do not as to this point support him For ignorance or unskilfulness they are not liable, except by an express undertaking For negligence they are surely liable, tho'

not regular practitioner -

It lies in gen'l vs every one by whose act or culpable neglect, the health of another is impaired (p 20) It lies vs a seller of bad wine, or food which has injured another's health - Indeed the Law implies a warranty that provisions sold are good 1 Fon 110 - 3 Bl 166 - So for exercising a noisome trade - producing the same effect (viz) impairing health - Esp 601 - 1 Roll 90-5. 3 Bl 166 - 122. 1 Com 166-170 - 9 Co 52. Hut 135 - 3 Bac 182 - 2 Roll 5.

For mischief done by a dog (as biting) if addicted to such mischief, owner is liable having notice - Not without such notice ✱ Cro E 350 - 1 Com 208. Judgment arrested if notice is not alleged - Sal 662 3 Sal 12. Lutw 90. Esp 601. 2. It is of the fist - 4 Treh. qa. cl. pr. 4 - ff ✱ under Stat. of Cont. he is liable without notice - See St. of Ct. 238. So in N. Y. in case of biting sheep) -

So tho' the injury be different as to the subject of it, from what the owner had notice of - &c - Notice of a dog's biting a sheep + he afterwards bit an ox - 2d Ray 209. Sal 662. 3 Sal 13 -

Scienter not traversable. i.e. not distinctly traversable "Sciens" not being a direct allegation - 4 Co 18 b. 1 Roll 4. 1 Com 208. General Issue, involves a denial of it -

9). For injuries done by animals feræ naturæ, the owner is liable without notice as all such animals are supposed to be addicted to mischief - 6 Bean, Foxes &c Replevin 9. 2d Ray 606 - Cro C 254. 1 Com 208.

The owner's liability in all such cases is on the ground of negligence, and of course the action is Trespass on the Case. 1 Com 208.

It lies for disturbance &c for unlawful hindering one from the free enjoyment of an incorporeal right p 20. 3 BC 236-241 - 1 Com 199. 9 Co 112. 3 Lev 266 - Cro E 845 - 1 Vent 275. 2 do 186 - 2 Roll 104 - 6 - 9. 6 - Obstructing a right of way - Diverting a water course &c (ante) 6 Ste 5. 638.

For an escape on mesne or final process this action lies in the Shff 2 Bac 245. 1 Show 176. Anciently the only action vs the Shff &c in either case was Trespass on the Case (ibid) Now by the Stat of 1 Rich 2d. debt lies on him for escape under final process - both still lies in both instances - Esch 609. Cro E 17 - Ste 873 - When debt is brought the jury cannot give less than the whole amount of the judgt. 3 BC R 1038. Still in Case Esch 609 - 10 - 2 Ste 126 - See Shff &c 20 (For the remaining index for the action of Escape see Shff & Sheriff -

For non feasance of under Shff, Shff himself is only liable *. for misfeasance or tort, both he & under Shff are liable -

(*)

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&c. voluntary escape embezzling a writ &c Esp 603 - Cro E 175. Sal 18. Dong 40. Comp 403. 2 Mod 32. For the reason of the distinction See Shiff &c 5. 6 - (In Ct. Under Shff is also liable) -

If a Shff having arrested on a mesne pro: - cess - refuses to take sufficient bail, when tendered he is liable in case, but not in tresp: He is not a trespasser ab initio - The absence of the authority of the Law being negative Cro E 141 - or 196 - Sh 23 - 7 C 6 - 1 Bac 286 - 2 Wils 313 - 2 Mod 31 - 8 Co 164 b - 1 Lev 189 1 Com 489. 5 do 582. 2 Roll 561 - 2 -

The action lies also on rescues of one taken on mesne process in favor of the original ~~process~~ pltff - 1 Bull 62. 6 Mod 211 - Salk 311 - 8 Mod 127. 1 Com 204 - Cro J 414. 486 - Esp 610 - 657 Cro C 77. Hut 180. Trespass vi & armis - Jury may give the whole debt &c in case - Exception dient for pltff to prove the original debt insolvent or out of reach - Bull 62 - Esp 657. Shiff &c 21 -

So it lies for rescue of one taken by final process in favor of the original pltff - Esp 610. Cro C 77. or 109 - Hut 98. 5 Com 438. So it lies in this case in favor of the Shff (Hut 98. 4 Bac 399 -) tho' not in the case for rescue on mesne process excuses him - Shiff &c 22 - (11)

Pltff by proceeding on rescues, discharges the Shff Semb Esp 610.

It lies for Shff on person escaping either on

mesne or final process (Esp 612) & that tho' the Shff himself has not been sued Esp 613. Cro E 52. So vs the under Shff - when the Escape is from him, in favor of the Shff (semb Esp 613.) but not in favor of the party vs an under Shff. unless the es= = cape be voluntary. (supra Cro E 234-5. 53. 3 Co 52 b. Shpp. tr 23 -

But the pltff's bailiff cannot maintain the action vs the party escaping, even tho' the Shff has recovered vs him - for he is not liable to the Shff by Law, but by con= = tract - Esp 603. Cro E 349 - The injury is to Shff & party not to bailiff - Shpp tr 23-4.

So it lies vs the Shff &c for a false return 1 Wils 336. Esp 615. Str 650. Cro E 729. Shpp tr 27-8.

So for omitting to execute legal process - as to make an arrest - 2 Bac 236 n. 2 Mod 234. Ld Ray 331. Shpp tr 16 -

12 Attorneys are liable to this action for neglect or misconduct, injuring their clients Esp 617. 2 Wils 325. 4 Bac 206. Martin & Sens. 57. Assumpsit 16 - If he neglect to appear for his client

Attorneys are sometimes liable to the ad= = verse party for dishonest practices - Esp 618. An attorney fraudulently takes a judg^t. vs the Deft after the Pltff had been non-prosed - Deft had case vs the Attorney Hut 125. 5 Wils 377. 3 BL 165. 1 Mod 209. Martin &

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Scrot. 55-6-

So if A personates B & acknowledges judgt. on him, the action lies vs A - 12 Coke 100. pl 1-

It lies vs Justices of the Peace who refuse to do their duty - Ex denying bail - refusing to authenticate instruments, which require their signature - as writs - depositions &c Esp 618. 1 Leon 323 - 1 Hawk 90. 1 Hal 97.

It lies not vs a person who has sued out a writ, for not countermanding it on settlement unless malice is proved. 1 Bosc 388. 2 Wils 302. No legal duty requires it - If afterwards, maliciously prosecuted action lies for malicious prosecution -

It lies vs an officer, corporation &c for a false return, to a mandamus. (See mandamus 7 p 22) Esp 648. 12 Cent 111 - Sal 32. Burr 134 - 4 Maul & Selw. 486 -

It lies for a breach of trust in bailees (13)
Esp 618. 2 Ld Ray 909 -

This action lies on the ground of negligence for the bailee in all cases of bailments - when the property is injured for the want of that degree of care which (according to the nature of the bailment) the law requires, or which is expressly stipulated for - 1 Com 208. 209. Co Lit 89. 4 Co 83 - Sal 26 - Com R 133 - 2 Ld Ray 909 - Esp 618. (See Trover & Bailt. p.) The action when thus laid is founded

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on tort 3 East 62. Pleas &c 48.

It lies vs owners or masters of vessels, for goods lost or injured thro' the latter's negligence East 623- Sal 440.

But the owners if sued it is said must all be joined - as the right of action is ex quasi contractu - Sal 440. 3 Sal 203- 5 TR 451- contra. The true rule is when the action is founded on negligence all need not be joined - the fist being tort - 5 TR 649 - 51 - 3 East 62 - 70. Aliter if the action is on the contract of bailment - express or implied - Pleas &c 48. Bailmt. 15-6 - (Contra 3 Cont.

And if one is sued alone upon the contract, he must plead it in abatement East 623- 5 TR 651- 5 Burr 2611- (Contra 3 Sal 203 - S.C ibo 440) In the last case cited (Sal &c) the action was treated ex quasi contractu - (5 TR 451) But it was the non joinder as the rule now is, which should have been pleaded in abatement - Ex -

(14). For actual fault of his own a Postmaster is liable - So are under officers for theirs - Cowp 765. ag.st L.d Mansfield 3 Wils 443 -

400.

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Post masters are not liable for notes or letters lost through the fault of subor= = dinate officers - Esh 624 - Sal 17. Cowp 724. The office is for intelligence - not insurance no hire paid to him by pltff therefore not liable as a common carrier - He is an agent for the public, & as such is not liable in such a case - (Master & Servt. 42).

Liable for injudicious selection of Ser= = vants to the public only -

Innkeepers are liable for all property of their guests lost for the want of that degree of care, which the Law requires of them - 3 Bos 179 - Palm 374 - 2 Roll 345. Bull 73 - 8 Co 32 - 1 Com 214 - Esh 626 - 3 Bl 165-6 - Ly 266 - Poph 178. Jones on Bailmts. 135. Not liable for goods stolen by guests servant or companion, or taken by public enemies - (See Bailmt. & Innkep

To subject Innkeepers for goods stolen &c Pltff must have been a traveller, & a guest & received as a guest Esh 626 - 5 TR 273 - Mod 78. A neighbor procuring lod= = ging, is not a guest within the Rule 8 Co 32. Esh 626 - See Bailmt. &c.

Innkeeper is not chargeable as such, un= (15) = less he receives profit from the guest or his goods Esh 627 - Ergo if the guest goes away & leaves his goods, he (Inn= = keeper) is not liable - Cro J 188-9 - Aliter if he leaves his horse; for this

Principal in the Case Ex Welfield -

is a profit tho' the owner is absent. Esp 627 Sal 388. "Jones, &c" -

So he is liable for dead goods if the owner's absence is but temporary & he is still a guest - Ex - going out in the morning on business & returning before night - Esp 627. Cro J 189

Sickness or non sane memory is no excuse for an inkeeper - Esp 628. Cro E 622 -

Innkeeper not liable for injuries to the person of his guest by third persons - as assault &c. Esp 628. 8 Co 32 b -

Innkeeper liable for not receiving guest unless he has good reason to refuse - 3 Bl 166 - Hard 163 - 2 Show 327. 1 Bac 344 - 3 do 180 - 2. Bul 70. 9 Co 87 - Dy 158. So of a common carrier -

(16) The action lies for deceit in sales; as false warranty or false affirmation - Esp 629 - Ex - affirming rent to be more than it was - Sal 211 - Warranting goods to be sound, or of such a value * &c Cov. Broken 17 - 1 Com 166 - 7 - 1 Roll 90 Yelv 20. Esp 629. Cro J 4 - (* Lex. as to fraud in the sale of real estate. 2 Day 128. Co L 384 - a note 1 Fonb 366 - 2 Cains 193 - Cruise Dit 38. c 5. § 57)

Where an express warranty unaccompanied with any collateral stipulation, is false at the time of making

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it, Vendee may support an action upon it, without either returning the property or giving notice to the vendor of the defect - Ashcomp 22. H Bl 17. 2 TR 745. Esp 13 - (34) 2 Ch D 101 n -

But if the warranty is coupled with an agreement that vendor shall take back the property, & refund if it shall prove unsound - vendee must return it on discovering the defect, in order to maintain an action on the warranty (2 TR 745) 1 Camp 194 n - 2 H Bl 573) And if under such an agreement the sale is rescinded by returning the property & an acceptance of it by the vendor; or by returning it only: (where by the terms of the contract no act remains to be done by the vendor) Ind: Asp: for money had & rec: will lie to recover back the price - Secus if the sale is not thus rescinded - 1 TR 133-6 - Comp 818. Dong 23 - 7 TR 181 - 5 East 449 - 7 do 274 - Com on Con 38.

Where the contract is not thus rescinded (as where vendor's concurrence in rescinding is necessary & is withheld) the action must be brought on the warranty or special agreement (1 Bl) Comp 818. Dong 24 - 1 Selw 112. 691-2. 3 Esp 42. 4 Mass 135 - 7 East 274 - & Ind: Asp: to recover back the price will not lie; As the express contract stile exists there arises no implied one -

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But if words merely warranted ~~sound~~ sound, without such an argument for returning them, prove to be unsound; the purchaser instead of suing on the warranty, may on discovering the unsoundness return the property even without the seller's consent & sue in Ind: Assump.t to recover back the price paid. (3 Esp 83) 1 Selw 688. n g) thus disaffirming the contract (See ante 7 East 274.) according to this rule the warranty seems to be regarded as a condition precedent to any right acquired by the vendor under the contract." Older Assumpsit.

(161) Or the buyer may in the last case sue on the warranty. (96)

But a buyer cannot recover back on a count for money had & unless the property is returned as soon as the unsoundness is discovered; not if the property (if a horse) has been worked by him or destroyed" 17 R 136. 4 East 449. 7 do 274. 1 N R 260. In such case his only remedy (if no fraud) is on the warranty 3 Esp 82. 4 do 95. 2 Ch P 101. n t. action on the warranty is an affirmance of the contract & the vendee retains the property. Seems when Ind: Asp.t is brought.

Upon express warranty an action on the warranty as such, or assumpsit will lie (Bing 20) 2 E. Special Assump.t

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The action does not lie as vendor for false affirmation, when vendee has been guilty of neglect ie when it is his own fault & folly to have confided in it. As if vendee might have easily learned the true value be Ex Vendor's affirm= =ing that I.S. would give £100. So if the defects are visible, a general war= =ranty, or affirmation extends not to them. Esp 629-30. L'Ray 1118. 1 Ford 110 Finch L 289.

2d. Will not a special warranty sub= =ject in this case? Esp 630. 1 Com 170. 3 Bl 165. Ex. That an apparent defect will occasion no loss or damage. I should think it would.

General Warranty of a horse holden good after verdict. tho' he had but one eye. (Sal 211.) upon the ground that the defect, might by possibility be secret or undiscoverable by vendee. He might be blind.

If vendee of warranted goods sell them this does not oust him of his right of action on the warranty * 2 TR 748 1 H Bl 17. (*. As the warrantee's right to cite in his warrantor to defend, in a suit for failure of title. See 1 Johns N.Y. 517. TR 517 &c.)

So it lies on the ground of fraud, for artfully disguising known defects. Esp 632. 2 Roll R. 5. Peak Ev. 229. 98 Cas 105.

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Wilfully concealing known defects, amounts also in Law, to a warranty. 2 Roll 5. Esh 629. 632. 2 Lev 120.

And it has been decided in Conn: that if one without fraud or science, sells property for the price that it would be worth if sound, the seller impliedly warrants that it is sound - unless the buyer expressly assumes the risk 2 Root 407. 2 Sw 120 - See 1 Pow 150 / Contra 3 T R 757. Peak 115. 123. 2 East 314. 1 Pow Con 142. 1 Johns 274 - 2 do 179. Caveat Emptor - See Contract 17. 24 - Contra also now in Conn: 4 Conn: R 428.

In the single case of a sale of provisions the Com. Law implies a warranty of soundness in quality - Sent (3 BC 166 - 1 Hawk 160) This exception seems to be founded on the high regard the Com: Law pays to life & health.

17) So where vendor practises fraud by false affirmation, in respect to his title to goods sold, this action lies - Science in this case is necessary when the fraud is the gist but if the action is founded on the warranty of title, expressed or implied, science can not be necessary - The gist is breach of contract Bull 30. Esh 629. 632. 1 Com 171 - Cath 90 3 T R 57 1 Ter 109. 373. Cro J 474. 1 Show 63 - 8. Sal 40 or 210. Ld Ray 593. 2 Sw 123. Dory 532. 2 East 448. 1 Johns R 129

A sale of personal chattels implies a warranty by the vendor that he has the

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title to them unless the contract is in=
=tended by the parties, as a bargain of
hazard, & case will lie upon the warranty.
Roberts on Frauds Con 523 or 5.23. 1 Fonb Eq
373. 2 Sw 120. Com. action for deceit & 8.
Cro 179. 474 - 1 Roll 90. 1 Johns 274 -

If vendee is induced by fraudulent repre=
=sentation to assume the risk of the quality
of the goods - he may still sue if they are
unsound - 6 Johns 188. R in dec in Con.

If goods are sold by a Bill of sale there can
be no implied warranty of soundness (The
vendor may be liable for any fraud in the
sale) 6 Ch 248. 1 Johns R 503. Deed excludes
it.

Nor will an action lie in such case
on a parol warranty - The deed excludes
parol evidence of a warranty. (6 Ch 248)
1 Johns R 414 - There can be no binding war=
=ranty in such cases, unless it be in the
deed -

So it lies for injuries occasioned by false
affirmations made to defraud (* as for a
fraudulent recomendation) tho' the person
making it had no interest in the fraud
3 TR 54 - 1 Com 167. 1 East 318. 2 do 92. 12 do
632. 638. 7 R 226 - 8 Johns 25. 3 do 271 - 6 do 81
3 Bos or 367 (If the recommendation be not
fraudulent this action will not lie) i.e.
if he was honest in giving it.

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So for injuries done by cheating - or false pretences - Ex false dice - personating another (ante) Esp 633 - Mod 583 - Cro E 90. 1 Sid 250. Bull 32. Action lies There must be damage as well as fraud - If damage & no fraud action will not lie - nor if fraud & no damage -

And it seems now settled tho' formerly decided otherwise 1 Camp 39) that where an action is brought for the price of goods sold, or labour done either upon a quantum meruit or even for a stipulated price (whether upon warranty or not) the deft may reduce damages by proving defects in the labour - or in the quality of the goods; & that where the one or the other is absolutely worthless proof of the fact will defeat the action 1 Camp 39 190-4. n. 8 Johns 453. 1 Esp 43. (Ld 4 Esp 95 Peak Ev 233 - 2 Str 169 contra) 1 Selw 691 - 7 East 479. And (semb) if he does not resist the claim in either of these ways but suffers judt. to go v. him for the full price or value claimed - he must bear the loss - He can not afterwards maintain (as was formerly the case) a cross action for the defect in the value or quantity or quality. 1 Camp 190. 8 Johns R 453.

So of a public nuisance occasioning private damage Ex Obstruction in the highway Bull 26. Cath 194. 451 - But if the party damnified might have avoided the damage by reasonable or ordinary

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case he can not recover - 11 East 60.
Bull 20. Cont. post 4' &c

If I, by a wrongful act, make an inno-
-cent person liable over to a 3d person, I am
liable to the former. Ex If I chase A's
cattle into B's land & thus subject A to dam-
-age, I am liable to him for the loss.
Rol Ab con 525 Cro C 325. Roll Rep. 1 Cath 3-4
Ath 3. 2 Sw. 282.

So if my servant by my command does an
act, which he supposes I had authority to
order, but for which he is subjected - I am
doubtless liable to him " Contracts 31- 1 Bos
Con 177-8. Auth 53- So to indemnify Sheff
for taking property on my execution at
my direction - 2 Bos Con 177-8.

Where a public right is obstructed or violated (18)
to the injury of an individual he may
maintain the action - Esp Rep. But he
must state & show special damage -
Ex - Pltff as an inhabitant of a certain
place, had a right to pass a ferry toll
free. ferryman refused to carry him -
He brought his action stating the com-
-mon right, but not laying special
damage - Action lay not - Sal 12. 5 Co 72-3
Cath 193-

So if a public nuisance occasions private
damage, he may recover of the author of
the nuisance - Ex. Obstruction in a
highway - Bull 26. Cath 194. 451- But if
the party damnified, might have avoided

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the damage by reasonable or ordinary care, he can not recover - 11 East 60 - Ball 26 con -

So it lies for injuries received from nuisance in general. Obstructing ancient lights - 9 Co 58. 3 Bl 216. 1 Vent 239 - But it is said they must have stood time immemorial - Poph 170. Cro E 118. Sal 459 6 Mod 116 - Now however long enjoyment (as for 20 years) is sufficient ground for presuming an ancient grant - Esp 636 - 2 Saund 175 a & b n 1 Des & Pul 402. 1 East 372. 2 Cont R 597-8. (In such case viz 20 years uninterrupted enjoyment &c) the jury are bound to presume such a grant -)

Enjoying lights 20 years by the tenant of an adjoining premise, will not conclude the landlord, without evidence of his knowledge of the fact - 11 East 372 -

How far is the privilege of ancient lights recognized in this country? No adjudged case here. I believe See 2 Cont R 597-8.

If a man having built a house on his own land, sells it, neither he, nor any person claiming under him, may erect any building that will stop its lights tho' they are not ancient. It would be in derogation of his own grant - Esp 636 - 1 Lev 122. 1 Com 2. 14 - 1 Vent 237-9 (I. G. raised a 2n - If the above doctrine is ever enforced in this country it must be with restriction -

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But obstructing prospect is not actionable a matter of pleasure or fancy merely. 3 Bl 217. 9 Co 58. Esp 636.

A house built near a street, is on the street side immediately entitled to the privilege of an ancient messuage: Lemb (Esp 636.) Ergo, action lies for raising the street - so as to obstruct the windows - 3 Wils 461 - 2 Bl 924 - Builder not improvident, in this case, as when he builds by another's land. (19)

One recovery of damages for a nuisance is no bar to another, for subsequent damages - Esp 637. Cro E 191 - 2 Leo 103 - Every continuance of it is a new wrong, or the repetition of the original one.

So the author of a nuisance does not discharge himself, by leasing or assigning from actions accruing after the assignment or the lease Sal 460. Cro J 373. Esp 637 - He remains liable for all the injurious effects, of his own illegal act -

So too in the last case, the action lies as the assignee or lessee if the continuance occasions a new injury. Esp 637. Cro J 373. 555 - Dyer 250 - Secus - where the whole injury is done by the first erection -

For obstructing ancient lights, action lies both in favor of lessee for years & rever= (20)

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= tioner: for it is an injury both to the inheritance & present enjoyment. Esp. 635-7. 4 Burr 2141- Cro C 325. or 237- 11 East 372.

So this action lies for overhanging Pltff's house or land, so as to cast water up= on it 3 Bl 216. F. N. B 184- 1 Roll 107. 1 Com 213- 2 Roll 140. 5 Co 101- Esp 637- 1 Str 634 So for erecting spout &c (Str 634- ut ante 4) Qu. Whether for the spout's barely hanging over action would lie. If owner wished to build & spout was in the way, action would lie -

So for obstructing a right of way over another's land - Esp 639. Cro E 84. 400 - Cro J 170. And such right may be presu= med from long & uninterrupted usage - Esp 640. Bull 74- Str 909. 11 East- 372-5.
In Con.t One acquires a right of way over another's land by 15 years uninterrup= ted use - This is a corporeal right de= rived from the statute of limitations (as 20 years in Eng.d gives a right to realty. Right of way is said to have been pre= sumed in favor of the public from a use of 6 years 11 East 376 n 1 Camp 260.

So, for erecting a manufacture or & the vapor of which injured Pltff's her= bage &c Esp 638. 1 Roll 89. Cro E 191- 3 Bl 217. As a smelting house - action lies.

So, for infecting the air about one's house in any way so as to render it un=

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= healthful - Esp Dig 637. 9 Co 59 a 1 Com 214. 2 Roll 141 - (p 8)

So for turning an ancient water course from Pltff's land, or mill Esp 648. 641 - 1 Wils 174. 4 Co 84. 1 Str 5. 6 East 208 2 Sw. 86 - 1 Rost 535. (2 Cont. R 93-584 J. G. think this case wrong in principle & strongly contested it - a mil of the judge - he says if A has enjoyed the use of a stream for 20 years - B may erect a mill above on his own land. be = cause he never has acquiesced in A occ = pying mill - the country might have been wild)

But a right adverse to the original, or natural one, may be acquired by 20 years uninterrupted & adverse user! or in 15 years in Cont. 4 Day 244 - 6 East 288. 1 Bos & Pul 400. 1 Camp 463 - 10 Johns 241 - 3 Cains 307 - 8 Mass 136 - 15 Johns 213 - 1 Cont. R 382. 2 do 584 - If one has used a stream uninterrupted for 20 years - those below can have no action by him -

Injuries affecting persons, as standing in relation to others, of husband, parent, mas = ter are remediable by this action - They have been treated of under the titles of the domestic relations - Esp 644 - 5 - 6 - Case of Husband (Bull 78. Co J 501 - 538) of Parent (3 Wils 18. 3 Burr 1874 - 2 Str 166 - 2 Ray 1032) of master (2 Saund 169. F N B. 390 - 2 Lev 68. Camp 45. 2 Bl R 383. 3 Burr 1345. (See Domestic Relations) -

Perhaps in the case it decide.

21). The actions brought in these cases have been in form, trespass & assault, but they are substantially actions on the case. Esp 645. 2 JR 107. Sal 206. 2 Ray 1032. 6 East 387. (p 3) Hurb & Wife 65. Parent & Child 115.

For other personal injuries: If a legal voter tenders a vote, & the returning officer refuses to accept it, case lies vs him. Esp 647. Sal 19. 3 Sal 17. So a candidate for an elective office, may have this action vs the returning officer, if the latter refuses to take & count his votes. Esp 646. 2 Vent 25. 1 Term 206. 2 Lev 50. 3 Mod 26-32.

So returning officer is liable to this action, in favor of the candidate, for making a false return of the votes at an election. Esp 647. 11 Co 99.

22) But it is holden that it lies not for a false return of a member of parliament, unless the right is determined in parliament, in favor of plff. or cannot be determined, as in case of dissolution (Sal 502. 6 Mod 45-9. Denied 1 Wils 127. & 2 Ld Esp. 647. Because the legislature has the ultimate & paramount right to decide upon the election of its own members. But Qu. is this a sufficient reason? Semb not. Has not the candidate an absolute right to a trial of the question by jury? Besides, how could the decision of the legislature be binding upon the Court? or upon the parties

Trespass on the Case ex delicto.

to the action? It is res inter alios acta.

The Eng.^h Stat. on this subject gives double damages & costs (7-8. W. III.

So it lies as an officer at Com: Law for making a false return to a mandamus - Esp 648. Bull 82. 3 Bl 111 - But not now in Eng.^d since the Stat. of 9 of Ann. if damages are recovered on the writ of mandamus (p 12) "Mand.^s"]

So, an Author may at Com: Law maintain this action, as such as publish his works without his permission 4 Burr 2303 *. The copy right is now secured under certain limitations by Stat. of U. S. (See Stat. of U. S. Tit. "Improvements")
* (Most elaborate of any case to be found in the books - This action lay in Eng.^d for publishing notes taken by Student from oral Lectures) —

So for violating the patent right, it lies as the violator in favor of the patentee - But the patent must be good in Law. Deft may deny that Plff is the original inventor - Esp 648. Sal 447. Bull 76-8-9 - 1 TR 082. (As to what patentee must prove in support of his patent, see the authors just cited -

Cognizance of the question now confined to the federal courts (i.e. U. S. courts) not so formerly (vid. U. S. St. supra)

Trespass on the Case or Deceit -

23 Jac. Action for obstructing process; If an officer is prevented by a stranger from executing process, as in locking the deft. door, case lies for the pltff in the process. S. Devon County. See 2 Co 98. 3 Co 98 a. Obstruction must be in nature of violent obstruction -

In declaring in special actions on the case no precise form of words is necessary as there is in formed actions Gilb R 193. 1 Str 544 - arg.[to] All the actions treated of under this title are special actions on the case.

Vide the actions pursued in Husb & Wife Mast & Servt, Mas.[r] & Servt. Hirer -

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Writ of Mandamus.

1. This is a prerogative # writ issuing in Eng.d from KB and answers in some degree in its effect to the specific relief afforded in Chancery 3 Bl 110 - It may issue from Chancery always (Tal 429 - 1 Vern 175) But the right is now exercised only by KB. (# Called "mongamus" as emanating from the high prerogative jurisdiction of the Court, which issues it -)

It is granted only in those cases - which relate to the government or the public - & where without it there would be a failure of justice 3 Bac 527 - Doug 506 4 Mod 281 -

Its object is to enforce obedience to the acts of the legislature & in Eng.d to the King's charters; & to prevent disorders from a failure & a defect of police. i.e from omission of duty injurious to the public - or the administration of justice - 3 Burr 1267. It issues only in those cases in which there is no other specific remedy - Generally not granted where there is any adequate remedy by action Doug 506 p 4. 1 TR 148. Cowp 377 -

The writ may in Connect. be granted by the Sup: Court as it probably may in each of the U.S. by the highest court of Ordinary jurisdiction, in the State -

2. The special object of the writ is generally to restore a person to some corporate or other franchise, or right which concerns the public or the administration of justice, & of which he is deprived, or to admit a person to the same rights &c Ex Bac 11 Co 93 - 3 Bac 529 -

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Writ of Mandamus -

The writ issues to some public officer - body corporate - or inferior court: commanding a performance of some official or corporate duty 3 Bac 528. 4 Mod 52 -

It is a writ demandable of right, & the Court of BR is bound to grant it, without imposing terms - 3 Bac 528.

It issues to compel officers of corporations to call meetings - to hold elections &c when by Law it is their duty & they neglect to do it - Str 1003 1157 - 1 Lev 91 - 1 Ray 69 - Ep 602 -

So to restore a person to every description of corporate offices of which he is unlawfully de= =prived Ep 661 1 Ray 431 - 1 Sal 14 - Ex If town clerk constables &c should be illegally deprived of their offices 1 Vent 77 - 4 Burr 1999 - Pop 176 -

So generally to command persons in authority to do their duty - Ex to the judge of an in= =ferior court to proceed to judgt. Str 113 - 2 Ret 871 - 3 Bac 535. 6 - to Ecclesiastical Ct. (Court of probate in Con.) to grant probate of a will or administration to whom it belongs - Ep 602 - 3 Bac 534 Carth 457 - Sal 299 Str 552 - (3)

It lies to a clerk of a corporation, requiring him to deliver up the books &c - to his suc= =cessor, on his being removed from office - & refusing to deliver them - Ep 663 - 667 - 2 Str 879 1 Wils 305 (Jedediah Strong's case)

Not fixed by any very definite general rule

Writ of Mandamus.

What offices concern the public - or administration of justice - & to which one may claim to be restored - or admitted by the writ - The writ has been much extended in modern times 3 Bac 529. Decided that a Mayor - Alderman, Common Councilman, town-clerk Constable - Sexton, (in Eng^d) parish clerk & some others are entitled to it - 3 Bac 530. 1 Co 94 - 2 Bulst 122. Noy 78. 1 Vent 143 - 153 - 1 Ray 211 - 2 Sid 112 - 1 Roll 535. Sal 175. Comp 371 - 377.

So it lies to restore one to the place of Atty - in an inferior Court (3 Bac 530. 1 Lev 75 - 1 Keb 549 1 Vent 11) as to our County Court -

The offices in these cases must be of a certain permanent nature. Therefore an office under an establishment or institution depending on voluntary subscriptions, not endowed, is not entitled to it - Ech 665. 1 Wils 11 - 1 TR 331. 4 do 125. Ex. Private library company, freemason's Society &c

But the office need not be freehold - It is sufficient that it is an annual office, & has fees annexed - Ech 666 - 1 TR 146 - This rule extends the writ to all our public offices in Cont.

It lies in Cont. to command a county treasurer to pay money to a County Creditor: For a County not being a corporation is not suable at Com: Law. So to command Justices to lay a County tax

Where the office is merely of a private nature the writ will not be granted - Ex - In Eng^d.

Writ of Mandamus -

the office of Steward of Court Baron Eck 666 - 1 Sid 40 / Vent 143 - In Cont. offices of private companies as library companies &c would fall under the description of private offices - As to turnpike companies incorporated, the grant of incorporation being analogous to the King's Charters & of public concern; the writ would probably lie for their offices - 3 Bac 528 n - So probably for the offices of a Bank -

The writ never goes to enforce an act, by a Court, magistrate &c when it is uncertain whether he has by Law, a right to do it - Eck 665 - 1 Wils 264 -

Nor when there is another specific legal remedy (5) &c - It goes not to a Bank to compel a transfer of stock; For Case lies - or in particular cases a Bill in Equity. Eck 666 Doug 506

It never is granted to compel a court or magistrate &c to do an act, when the doing of it is discretionary (Eck 668. 2 Str 881 - 2 Bl R 708) as to adjourn or continue a cause, or to grant a new trial -

If several are deprived of Franchises, offices &c each must have a separate mandamus - They can not join; for the wrongs are distinct & the causes may be different - Eck 668-9. Sal 443 - Bull 200 - As in case of several aldermen of the same city.

As to the mode of granting the writ: It is not usually granted in the first instance though it sometimes is - The usual mode is by Rule

Writ of Mandamus.

to show cause (Ch 169) & this rule is not granted but on affidavit of the party applying - 3 Dac 528. Bull 199 - 200 - 3 BC 111 -

But under pressing circumstances it will issue in the first instance on motion - Ch 169 Lancs 2 180. Ez To sign a poor rate in Eng. So in "immediate cases" & cases of notoriety where the probable ground is manifest. 3 BC 111 -

5) - It is never granted till there has been a default - It goes not to prevent a default, in the first instance Ch 670. Bull 199 -

The writ is directed to the person whose duty it is to perform the act commanded - Ch 872 Sal 433-6 - It is to be delivered to him - & he must at his peril do the act - or return sufficient reason for not doing it - return to be in writing - because in the nature of a plea to the writ -

When the act ought to be done by a part of a corporation aggregate it may be directed to the whole corporation, or to that part which is to do the act but not exclusively to any other part - Ch 673 - Sal 699 - 701 - Str 55.

When sufficient cause is shewn the writ is not shown under the rule to show cause the writ itself issues; at first in the alternative - To do the act or show sufficient cause for not doing it - 3 BC 111 -

7) If the Deft returns a true & sufficient reason

Writ of Mandamus.

he is excused, and at Com: Law the return could not be traversed - but case lay for false return - Esp 648. 3 Bac 543 - 2 Ld Ray 481 - (our courts have adopted the reason of this Stat -) Tuck: on Case: 12 -

And if the complainant prevails either by verdict or otherwise - on the pleadings: he may recover his damages & costs - But if he thus recovers on the writ of Mandamus he is barred of his action for a false return Sir J Atm 220 S 203 - Vol 12 p 190 -

Since this Stat - if the return is false (which is a question to be tried by the Jury) the party injured has a peremptory mandamus (i.e a peremptory order to do the things required) 3 Bl 111 - Esp 648.

So if the return is insufficient upon the face of it, a peremptory mandamus issues both at Com: Law & under the Stat - No issue to the jury is thus necessary - 3 Bl 111 Esp 645. Bull 201 -

Before the Stat of 9 of Anne the only remedy for a false return was an action on the case i.e the return could not be falsified in the proceedings on the mandamus - Esp 648. 3 Bl 111 - 11 Co 99 - And if the false return were made by mistake, the action might have been by all or any: it being for a tort - Esp 185. 3 Bac 544 Carth 171 - 2 - And the action lay for suppression vere in the return (Bray 144) as well as for a positive false-hood -

Writ of Mandamus.

But if any one of the several persons had voted as the false return was overruled, no recovery can be had by him - Esh 685 - Cath 172 - 2 Ray 504 -

8) At Com: Law if the return is falsified in the action on the case, a peremptory man= damus issues of course - Esh 684 - 3 Bac 544 Sal 430. (provided the action is in the same court by which the writ of manda= mus was issued - For the falsity of the return then appears from the record of that court - as in B.R. in Eng.d or Sup. C.t in Con.t

But if the action is in a different court the truth of the return must be tried, by an issue joined for that purpose (Sal 428. Esh 684 ante) after recovery on the ac= tion: But the record in the action is con= clusive I suppose upon the issue -

If after peremptory rule to return the writ no return is made, an attachment issues for contempt - 3 Bl 111 - 3 Bac 451 - 2 Sal 429 434 - Esh 685. And if the writ was by several the attachment must go as all tho' some would have made a return * Str 808. Con= tempt is punishable by fine or imprisonment or both, & in some cases with corporal or in= famous punishment - 4 Bl 287 - Cro C 146 -

(* Those however who would have obeyed the rule, will not be punished under the at= tachment) -

If the party to whom the writ is directed fails in respect to the court, in his return, he is punisha= able for contempt by attachment - 3 Bl 111 -

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Writ of Prohibition -

1) This is a Prerogative writ issuing generally from - B.R. to prevent inferior Courts from deciding cases out of their jurisdiction. 3 Bl 112 - 4 Bac 240 4 Com 487 - F.N.B 39 - 40 12 Co 6 - & 279 or to prevent them from deviating in the mode of their proceedings from any regulations prescribed by Stat - 2 H 8 C 100.

It may also issue in some cases out of Chancery - Common Pleas - Exchequer 3 Bl 112 - 10 Mo 476 - Hob 15 - Palm 523 - 4 Bac 241 - 12 Co 58. 4 Com 489 1 Ve Bl 476 -

It is directed to the inferior court & the party prosecuting in it; & is founded on a suggestion that the cause itself or some collateral question arising in it, is out of the inferior courts jurisdiction - 3 Bl 112 or that the Court is deviating ut supra -

The mode of obtaining a prohibition is by rule to show cause why &c & in many instances affidavit must be made that the cause or question &c is out of the inferior courts jurisdiction - Also when that fact appears from the face of the declaration libel &c of the inferior court - 4 Bac 244 10 Mo 476 - Sal 549 - Holt 593 - Hob 79 - 2 Ray 1211 -

2). Whether the awarding prohibitions is ex debito justitiae or discretionary, authorities contradictory - Buller's opinion said to be that it is discretionary - 4 Bac 242 Hob 67 1 Ray 3.4 Sir 65 Sal 33 - 2 Ray 220 578. 586 - 1 Ray 92 (, Mood R 24 - Mood Eq. 13-14 ult Dictionary)

Writ of Prohibition -

It lies in some instances where the inferior Court has jurisdiction of the cause - Ex When a Stat. has been passed regulating the proceedings in such a cause & the inferior Court deviates from those regulations - This case & the case of a want of jurisdiction are said to be the only ones in which a prohibition can issue 2 H BL 150.

For the purpose of obtaining the writ the party aggrieved in the Court below, sets forth upon Record in the Court above, a "Suggestion" containing the nature of the cause of his complaint 3 BL 113 - upon which a rule is granted to the inferior Court & adverse party to show cause p 1 -

If the matter "suggested" in support of the rule is sufficient the writ issues - 3 BL 113 - Aliter if it is insufficient - The writ commands the court below not to hold plea &c & the adverse party not to prosecute 3 BL 113 -

But if the sufficiency of the cause suggested is doubtful, or presents a question of difficulty, the party complaining is directed to declare in prohibition (3 BL 113 - 4 Bac 248. Cro E 736 -) i.e. to prosecute an action by filing a declaration to the opposite party upon a fictitious averment not traversable that the latter has prosecuted in disobedience of a prohibition, before granted; The rule has in fact been granted - Barns Notes 148. 7 N B 44 - 1 Lev 125 4 Mod 151 - 2 Cro E 736 - 4 Bac 248. This is done for the purpose of having the question more deliberately & solemnly

considered than on motion - on which the proceedings are summary.

3). The declaration must follow the suggestion the action is then regularly proceeded with, as if the petition, allegation were true - & the question of the sufficiency of the cause alleged is tried upon the pleadings in the action - If the cause suggested & alleged is adjudged sufficient judgt. with nominal damages is given for Pltff - & a prohibition issues to the Deft - & the inferior court commanding them to proceed no further - 3 BC 113-14 4 Bac 248 n

If insufficient judgt. is for Deft & a writ of consultation awarded - i.e. a writ issued upon deliberation or consultation, had - permitting the cause to the inferior court - to be there determined notwithstanding the former petition prohibition - 3 BC 114 -

So a writ of consultation is sometimes granted when there has actually been a prior prohibition issued. The party prohibited may take a declaration (pursuing the suggestion) & traverse the fact on which the prohibition was founded - & if the issue is found for him - a consultation is awarded - 3 BC 114. The effect of this proceeding is to reverse the former actual prohibition

4). The Court also of its own mere motion (without any action brought) sometimes awards a consultation, after a prohibition issued - & when upon further consideration it thinks the suggestion insufficient - 3 BC 114 - 4 Com 517.

Writ of Prohibition -

Disobedience to the writ is a contempt - punishable by fine & imprisonment at the discretion of the Court - 4 Bac 262 F N B 40 & 279. 4 BC 287.

It is also contempt to commence a new suit in the same inferior court for the same thing after a prohibition 4 Bac 262 - Mod 599 - Lev 111.

On the attachment for contempt the plff recovers damages & costs for the other proceeding after the prohibition; & a fine or other punishment is also implied for the public offence 4 Bac 262 - Cro C 559 - 1 Vent 348. 3 Lev 360 - 4 Bac 248 n -

We have a statute vesting the power of granting prohibitions in the Sup Ct. & enabling the Ch. Justice & Ass. Justices to do it in vacation - This Stat adopts the Eng. Law on the subject Sta Ct. 558. (5)

Finis -

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Writ of Habeas Corpus.

This is a writ by which, a person restrained of his liberty, may be brought before some superior court, for some special purpose - as either on his own application to be relieved from confinement or to obtain justice, or upon that of some other person having a right to require his appearance. 3 Bl 129-131 - Of this writ the kinds are various - (1)

I. Ad Respondendum.

This lies where one has cause of action vs another - confined by process of an inferior court - to remove the prisoner so as to charge him with a new action - in the court above - 3 Bl 129 - 3 Bac 2 Ryer 197 a. 249 - 2 Mod 198. - Not in use here - being unnecessary in our practice -

II. Ad Satisfaciendum - This lies when judgt. has gone vs a prisoner, & the pltff would bring him up to charge him with process of Execution 3 Bl 129 - Not in use here for last reason

III. Ad faciendum & Recipiendum - Which lies where a person confined by a process of an inferior court, wishes himself to remove the action to the Sup Court to be there decided - Here his body is removed by Hab: Corp: the proceedings by Certiorari - 3 Bl 130. 3 Bac 245. 1 Mod 235 2 do 198. Frequently called Hab: Corp cum Causâ.

This kind of hab: corp: is demandable of common right & without any motion - 3 Bl 130. 2 Mod 306 - It instantly supersedes all proceedings in the court below - & any subsequent pro- (2)

Writ of Hab: Corp:

= cedings are void as coram non judice -
3 Bac 15. Sal 352 - 12 Mod 550 -

Not granted (the matter of right) when it would abate a rightful suit; or rather a procedendo would be awarded in such case - Ex If feme sole being sued in an inferior court - marries & would thence = = move it - For if proceeded with in the higher court the suit would abate for the non joinder - of the husband - 3 Bac 15. Sal 8. Not in use here - Actions in inferior courts are under our law removable by appeal when removable at all -

IV. Ad Testificandum - When a party ~~who~~ wishes to produce a prisoner as a witness - 3 Bac 3 - 3 Mod 51 - Comp for Cont 117 - 48. Kirb 137 -

Formerly holden that this wrought an escape of a prisoner in execution - 1 Sid 13 - 3 Co 44 - 2 Bac 238. See 1 Root 72 - & "Sheriff" &c not so now -

(3) - But if the Sheriff or Gaoler in such case gives the prisoner unnecessary liberty - as to go at large or goes with him in a very cir= = cuitous way - it is an escape - 1 Mod 116 - 2 Bac 238. Cro C 14. Hob 202 - 3 Co 44 - Sheriff &c This strictness held only when prisoner is committed on execution -

Never granted to bring up a prisoner of war Doug 403 - Over such prisoners the Com: Law have no jurisdiction for such murders -

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Writ of Hab: Corp.

They are subject only to the executive go=
=vernment, & must be brought up, if at
all by order of the executive -

There are some other kinds of Hab: Corp:
writs 3 Bac 2. 3 - But

V. The principal writ of Hab: Corp: is that
of ad subjiciendum - directed to a person
holding another in custody & commanding
him to produce to to do submit to, & receive
whatever the court or judge shall award -
3 Bl 131 - This is a Common Law writ in fa=
=vor of the subject. 1 Burr 631 -

This is the great writ by which release is
obtained from every species of illegal con=
=finement - 3 Bl 131 - Rost 92-3 - And the
Stat of 16 & 31 of Car II. Which give the
full benefit of it to the subject, are regard=
=ed in Eng. as a second Magna Charta -

A person imprisoned by either house of Par= (4)
=liament for contempt - can not be dis=
=charged by the process (8 JR 314) Such im=
=position would be an invasion of the
privilege of the Legislature - Rule the
same in this country -

It issues at Com: Law: from B R Chanc.
& by a fiction (P, privilege or of being a bai=
=lor) from C B - & Exchequer Cro J 543 -
3 Burr 856 - 2 Vent 24 - 3 Bl 131-2 3 Bac 3. 2 Mod
198. 2 Hall 144 - But in case of commitment
for a crime, these two courts could at Com:
Law only take bail for appearance in B R

Writ of Hab: Corp: -

or remand - 3 Bl 132 - Then having no criminal jurisdiction, could not discharge - But now since the Stat of 16 of Car II. c 10 - the full benefit of this writ may be had (without any fiction lent) in either of these cases - 3 Bl 132 2 Mod 198.

Whether it may issue from Chancery in vacation 2 Bl 132. 3 Bac 3 - 2 Hale 147 - seems not

In Cont. it may be issued by any judge of Sup Ct. by the Courts of Com: Plas, when in session or by the Chief Justice of that Court in vacation 1st of Cont. 09 2 Do 186 -

It is directed to the Gaoler, or other person detaining to produce the body with cause of his detention - 3 Bl 131 - Fat 330 - 2 Ray 588 - 818. And the court as the case requires will discharge, admit to bail, or remand - 3 Bl 134 - 5 Mod 22 - 1 Vent 330. 346 -

The great object of this writ is to afford expeditious relief to all persons, who are restrained of their personal liberty, without lawful cause

51 - The Com: Law remedy afforded by this writ - having been evaded by the judges - a Stat was passed (31 Car II.) which in a great measure regulates this writ - 3 Bl 135 - 6 - 3 Bac 7 - 8.

Since this Stat any of the 12 judges may issue it in vacation - 3 Bl 131 - 136 - Cro Cr 543 It lies for persons committed by the King or his Council or Secretary of State &c - 3 Bl 135 - 6 -

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Writ of Hab: Corp:-

By the constitution of the U.S. the privilege of the writ of Hab: Corp: can not be suspended except when in time of rebellion or invasion the public safety requires it. (Const. of U.S. Art. 1 §9) and it must then be done by Congress.

It lies not for persons committed on execution or conviction; & by St. 31 Car II. it is ~~denied~~ denied under special circumstances & restrictions. in case of commitment for treason felony & in certain other cases. 3 Bl 136. 3 Bac 9. 10 Mod 429. Str 142.

It lies in favor of children, wards & wives unreasonably confined by parents, guardians husbands. 3 Bac 15. 3 Keb 526. 2 Lev 128. Str 982. and the writ may be sued out by the friend of the person confined. Str 982. 1 Burr 606. 5 Mod 21. (2 Lev 128.) Burr 631. 1362.

Disobedience to the writ punished as a contempt. 3 Bac 10. F N R 68. 12 Mod 666. Finis.

Quo Warranto.

This writ lies to any one, who usurps an office, or franchise, without right - or ex= = ercises one which he has forfeited - 3 Bl 262 - 2 Inst. 282 -

The proceeding in modern times, is usually by information filed, in B R by the Attorney General - a criminal proceeding - the writ being now disused 3 Bl 263 -

The effect of this proceeding is the re= = moval of the usurping incumbent by a judg.t of ouster & Pt -

See for the proceedings, the authorities supra + Bac Abr. ("Quo Warranto") Com - same title - Fines -

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Bills of Exceptions.

A bill of Exceptions is a statement of facts occurring on trial & of some interlocutory judg.t founded on them annexed to the Record - (facts not originally appearing on Record or in Pleadings.) called Bill of Exceptions because it contains exceptions to the Interlocutory judg.t. 3 Bl C 372. 1 Bac Ab. 325. 9 Co 13b. 4 Bac 13b
All decisions by the Judge upon any point of Law is an Interlocutory Judg.t.
Charge by the Judge to the Jury - is a judg.t within this rule.

Bills of Exceptions were introduced into Eng.d by Statute Westm 2.d they were not known at Com. Law 1 Bac 325. 3 Bl 372 - 9 Co 13. Bull N P 315. 1 Keb 324 (Kirb 168) - 2 Inst 426. This Stat. of Westm. is probably adopted either by the C.t of Justice or by some legislative act in most of the States in the Union.
When taken.
A Bill of Exceptions cannot be taken except in a Court from which a writ of Error lies. as its object is to found a writ of Error & consequently it can be filed only in a Court of Record.
Bull. 31b. 1 Bac 327.

But it may be filed in all those courts whose judgments are liable to be reviewed on writ of Error. as in C P. K B. Court of Exchequer &c - not in Chancery then - not C.t of Record. 1 Bac 32b. 2 Show. 287. 147. Bull 31b. 2 Lev 237. Skin 35b. 2 Show 287. 147.

In this State it may be filed in Superior Court - County Court or Justices C.ts - Some doubt as to Justices Courts - (Kirb 289) Why? -

Bills of Exceptions.

For what causes.

Some cases in which Bill of Exceptions may be filed have been mentioned under former titles. "Pleading". Overruling an offer to demur to evidence. 1 Bac 326. 9 Co. 136. Cro C 249. or 341. 4 Bac 136.

Again. the Bill may be filed for a misdirection by the Judge in point of Law to the Jury, 1 Bac Abr. 564-5. 2 Wil 288. 1 Str 1.

But the usual remedy for a misdirection by the Judge is a motion for a new trial.

If Evidence is admitted or rejected, & the decision is erroneous - a Bill of Exceptions may be filed
1 Bac 326. 2 Lev 237. Bull 316. But such a mistake is more often remedied by a motion for a new trial

But if the Judge admits a party's evidence a Bill of Exceptions will not be allowed because he did not instruct the Jury how to find on that. Evidence for there is no Interlocutory Judgment in the Case: i.e. a decision on a point of Law

Ray 405. 1 Bac 326. Bull 316.

If Oyer is refused to a party who is entitled to it. he may file a Bill of Exceptions for this cause. tho' advantage is usually taken by entering oyer on the Record as a plea "Pleading" 105.
So, if ordered when it ought to be refused.

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Bills of Exceptions.

Again. when a Judge allows or overrules a challenge to a Juror. the mistake is a good ground for a Bill of Exceptions tho' often remedied by motion for new trial For this alles is a point of Law, & if incorrect may be objected to. 1 Bac 325. Dyer 231. Ray 486. 2 Inst 427. Plas 105.

But on an interlocutory judgment or order relating to mere practice, & which does not involve any principle of Law. a Bill of Exceptions cannot be taken - thus if he compels a party to plead within a certain time, if he orders security for costs or refuses to order on motion &c -

Rule - when a decision of any kind is discretionary with the Court, a Bill of Exceptions will not lie for that cause. for a Writ of Error would not
The granting or refusing of a new trial is no ground for Error - Again the imposition of terms on him who moves for a new trial. of these Error is not predicable.
Bull 316. 1 Bac 327. 1 Rost 290.
The Court can not arbitrarily grant a new trial, (tho' it may refuse one) & if it does - or if it is granted by a Court which has no power of granting it in any case, it is ground of Error.

In prosecutions for Treason or Felony a Bill of Exceptions can not be allowed. the reason assigned (which I. G. does not think the correct one) is that the Judge is of counsel for the prisoner, & must see that Justice is done him

Bills of Exceptions.

but this is surprising - as the Bill is always founded on a supposed mistake of the Ct. 1 Sid 84. 1 Lev 68. 1 Keb 324. Ray 486. Keling 15. 2 Mc Nal. Ev. 325. The Reason is that such cases are not within the purview of the Stat. West 2d. & because in prosecutions for Treason or Felony there can not be at C. L. a new trial - "No man shall be twice punished for the same offence". & "No man shall be twice put in jeopardy for of his life for the same offence." are 2 maxims of the Com: Law - May not a Bill be filed for, the not vs. the prisoner - How far Bills of Exceptions are allowed on indictments for mere misdemeanors appears not to be clearly settled -
1 Bac 325. 2 Hawk 428. 1 Leon 5. 1 Vent 316. Bull 316. Keling 15. 1 Mc Nal 326-7. Ray 486. 1 Sidrop 55. It has always been allowed in England on indictments for mere trespass or breach of the peace - (1 Leon 5. 1 Bac 325.) for the Defendant - for he is often entitled to a motion for new trial - but the prosecutor never can except in one particular instance See "New Trials" -

Regularly when a Bill of Exceptions is allowed, the Court will not suffer the party to move in arrest of Judgt. on the point on which the Bill was allowed 1 Bac 327 2 Lev 237. 1 Vent 316. 2 Johns 117. & the party's remedy is by his writ of Error. i.e. on the point tro't upon the Record by the Bill - But this rule has sometimes been dispensed with in K B. Bull 316-17.
Confined to Specific points -
As the object of the Bill is to draw before a

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Bills of Exceptions.

higher Court the judg.t on some collateral point it is regularly not allowed to embrace in a Bill of Exceptions the whole merits of the Case. The Rule therefore is that a Bill containing a general statement of the whole facts & arguments in the cause is inadmissible. tho' sometimes practised.
Bull 316 Morgan's Ch. 46. 8 Term R 549.
Comp 161. 3 B R 555. 2 Sw 276.

And if the Court below allow such a general Bill the Court above will quash the Writ of Error.
1 Bl R 555. Comp 161. Hist 77. 339. 454.

How certified.
As to the mode of stating & authenticating this Bill. I observe that it is authenticated in Eng.d by the signature of the Judge. & it is certified by the Judge's appearing in the Court above & acknowledging in seal. & then for the first time it becomes part of the Record.
1 Bac & Ad 32. Comp 161. 1 Bac. 325-6.
In Con.t the Bill becomes parcel of the Record in the Court below & is exemplified with the rest of the Record.

A Bill must contain a statement of the Interlocutory Judg.t & of the facts on which that Judg.t was founded. & if the facts are truly stated, it is the duty of the Judge below to certify it. If the statement is not true he is not bound to certify it.
1 Bac 326. Bull 316.

If the Judge below refuses to certify a

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correct Bill - the Stat of Westm. 2d provides a writ compelling him to sign it -
, Bac 326. 1 Lev 237. Bull 316. Comp 161-2. Show Pr. 116.

In this State the Bill is certified by the presid=ing Judge (if more than one) or by the Judge if there is but one -
A motion for a new trial is not so re=medial as a Bill of Exceptions as the for=mer is discretionary the latter strictly juris -

When to be tendered -
In the English practice the Bill must be tendered or the substance of it reduced to writing - at the trial i.e during same term.
Bull 315 Sal 288 - Holt 341

In Con^t. the party must give notice or move to file a Bill at the time the cause accrues, & the Bill itself must be filed within 24 hours after verdict. (if tried by Jury) or of Jud=gment of Court - & must be presented be=fore the end of the term it before Court rises -
, 12 Ort 569. 573. 2 Sw 276. In computing the 24 hrs Sunday is excluded - "Dies Dominicus non est juridicus -
Vid. Rule of Sup. Ct. 3 Day 28. g.
A Bill of Exceptions is no supersedeas of the Judg^t. but merely enables the party to ob=tain a supersedeas by writ of Error.
, Bac 327. 12 Mod 609.

Outline of Con^t. Bill of Exceptions -

It is a separate instrument or writing beginning thus. Litchfield Co - ss - County Court

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Bills of Exceptions.

Such a time such a year A B vs C D.
Action - Debt Plea Not Guilty.
"On the trial of the said cause to the Jury on the aforesaid issue the Plff offered in evidence such a witness to prove such a fact to the admission of which evidence the Deft objected - &c (stating grounds) but that the Court overruled objection. to which decision he now excepts & prays the Court to certify this his Bill of Exceptions that it may become parcel of the Record &c" -

This Bill when & it becomes a part of the Record is a foundation for a writ of Error. In Eng.d it is no part of the Record in the Court below 1 Bos & Pul 32, nor till certified in the Court above.

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13. A writ of Error is a commission to the Judges of a higher Court, to examine the Record on which a judgt. had been given in a Court below, & to affirm or reverse it according to Law - 2 Bac 187. 3 Bl 407. Jenk 25. 2 Inst 40. Nelv. 209.

In Eng.d the writ of Error does not summon the Deft in error to appear &c. He is summoned by scire facias ad audiendum errores. 2 Bac 216. 207. 3 Bl. Appx No 3 p21. (last head) Tidd in Comm.d 2 Ro. 276.

In Comm.d it is an original writ summoning the deft in Error to appear - to hear the original record, & the errors assigned &c. & reverse the assignment of Errors.

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When writ of Error is founded on a mistake in the legal opinion of the Ct. below it is founded on some point of law appearing on the Record. As if ~~the~~ -

But not to rectify an Error in the determination of facts, or weighing of Evidence.
2 Bac 189. 3 Bl 407. Cro E 233. Ley 35. 1 Leon 233. 5 Com 286. 1 Roll 746. Bacon 142.

The term "Writ of Error" without further description usually means an error founded on an error apparent on the Record 2 Bac 187. 3 Bl 407

But there are writs of Error founded on error in fact - i.e. on errors not apparent on the Record below, viz infra 4. 15 &c -
3 Bl 407. 2 Bac 187.

If on a judgt. of reversal the Plff in Error can recover any thing in the nature of debt or damages or land it is then considered as an action - because there is a judgt. and requisite - for by the reversal of the judgt below it is apparent that Plff in Error

And a release of all action, will bar such a Writ of Error.

If the case is one which entitles Plff only to reversal of Judgt. & costs being it is not considered as an action & of course a release does not bar it - 2. Lit 288. 9. 2 Bac 187. 225. 8 Co 152. 1 Roll 788. 2 Roll 405.

Writs of Error.

Coram Vobis.

There is however another species of Writ of Error founded on matter of fact dehors the record -

This lies to Courts of Error capable of trying the questions of fact - as B. R. but not to others, as the Exchequer Chamber (that Ct. has no jury) "Pleading" 31. 39. "Parent & Child" 63. Cro J 5. 1 Vent 207 2 Lev 38. 2 Dac 215.

Or it may be brought in the Court in which the original judgt. was rendered - & then it is called a "writ of Coram vobis"
Ex. Judgt. agt. feme covert alone - or agt. Infant appearing without guardian or next friend - 3 Dac 157-7. 4: 39. 2: 198. 217-8. 228. Carth 122. 179. 367. Cro J 5. 10. Hob 114. Sal 400. 2 Roll R 53. 3 Com. 177. 5: 300. 286. 1 Vent 207. Yelv 58.

This is not strictly writ for an Error of the Court but consists in an error on some extrinsic fact In case (sup) of feme covert, Baron & feme may join in a writ of Error to reverse the judgt. either before the Ct. that renders it or a higher one - In case of Infant (sup) Court on information will appoint a Guardian ad litem

So, if Pltff or Deft is dead when judgt. is rendered (15)
4 Dac 143. 2: 218. Ray 59. 5 Com 286. Hob 232. Carth 338-9.

If Shff returns that the original party is alive he may come in, & plead "in nullo est erratum".

Writs of Error.

Carth 339. "Pleading" death of parties".

So, if the Judge who gave judt. was interested in the cause. 3 Com 177. Str or Style 639.

So if one sues, & recovers as Executor of J. S. & J. S. being alive, semb. 3 TR 129. Compare with 5 Com 177. 1 Rol 744. A writ of Error will lie to reverse the judt. either before a higher Court or Coram Nobis. The same of J. Peace as such. I have no doubt judt. in this case may be reversed in both ways. Post 18.

A writ of Error will not lie on any judt. of a Court not of Record (for it is founded on the Record) (2 Dac 194.) as County Court in Engd. Co. Lit. 288 b.

Hence in Engd. it lies not on any decree or sen:-tence of Chancery. 2 Dac 194. 5 Com 289. 1 Roll 744 Bull 235. For this is not a Ct. of Record. The rem:-edy in Engd. is by appeal to the house of Lords.

But on a judt. given in the petty bag office, in Chancery it does lie in B. R. For this Court proceeds according to the Com: Law & is a Ct. of record. 3 BC 48-9. 2 Dac 194. 1 Roll 744. Dy 315. Mo 570.

It lies on a judt. of non-suit. Dy 32 a. Str 285. 1 Roll 744. 1 H BC 432. In this last case the judt. must appear I conclude on a bill of except:-tions. (But not on a voluntary non-suit.) So also on a judgment by default. 2 a?

In Connt. by Stat: Error lies on a decree or sen:-tence in Chancery, as on judts. rendered by Courts of Law. Stat. Connt. –

Writ of Error.

So on judg.t of County Court & of single magis= =trate (Ib) to Sup.r Court. And from judg.t of Superior Court to Supreme Court of Errors.

As was observed (ante 13. 14) this writ lies. In matter of Law apparent on the face of the Record & matter of fact not thus apparent.

Still, assigning Errors in Law & in fact together (16)
is ill. 2 Bac 217-8. 5 Com 300. Pl.dm. 3 Bis. 1 Mod 761. 1 Sid 147. Leon 105. Ray 231. 1 Vent 252. For they re= =quire diff.t trials - matters of fact - by jury. of Law: by the Court. 2 Bac 217-8. Yelv 58. Sid 93. Ray 59. This fault is in the nature of duplicity

But tho' matters of fact & of law are blended in the assignment of Errors, yet if Deft in Error plead, "in nullo est erratum in record" he loses the advantage of the double assignment, & that plea ex'ly confesses the error in fact, or rath= =er the fact assigned for error, (for there is room for but one trial & perhaps not that for the confession may preclude the necessity of it) 2 Bac 209. 218. Carth 338. 9. 1 Vent 252. 1 Lev 6. Sal 268. 6 Mod 113. 206. 2 Bac 267. He should demur.

But a general demurrer would reach the defect tho' it is called duplicity. 2 Bac 218. Carth 338-9. Writ of Error not being within the Stat. 27 Eliz which requires a demurrer for duplicity to be special. 1 Bac 95.

If the unsuccessful party should assign Infancy & Coverture both at once, it would be

duplicity, for either of them is sufficient to arrest judg.t: on each there should be a distinct issue, as there always must be for every error in fact.

Thus assigning several errors in fact amounts to duplicity. 5 Com. 300. Fitz N.B. 20. Seem, when several errors in Law are assigned. 5 Com. Plead 315. 3 B. (Duplicity is not predicable of mere matter of Law as there one issue reaches through the whole record.)

(17)

For errors in fact require several distinct answers or issues. but Errors in Law do not. "In nullo est erratum" answers the whole.

If an error in fact be well assigned, it should be traversed (otherwise Deft. in Error cannot prevail) Pleading in nullo est erratum confesses it. 2 Bac 218. 1 Com 303. Yelv 57. 1 Sid 93. Ray 59. 231. Com. Pl.d B 15.

Thus if Plff in Error plead that "he was an infant" Deft. by pleading in nullo est erratum" confesses it. (Ib.)

But if it be ill assigned, In nullo est does not confess it. Cro J. 12. 29. 529. Ray 231. 1 Roll 758. 2 Ro. 277. As if the assignment contradicts the record. (post 18. or alleges a fact, not assignable as Error.

Decided by the Sup Ct. that assigning with suff.t errors in Law errors in fact. not assignable does not vitiate the writ. this was on special demurrer. (Mich 27. 30.) In another case on

plea in abatement, founded on the blending of Errors in Law & in fact Sup Ct ordered the assignment of the errors in fact, to be struck out & reversed for the others. Rost 262. 2 Sw. 277.

An assignment of Error in fact, which contradicts the record is not good. 2 Dac 218. 9 - 1 Roll 757. 09 Ea. That the Court did not sit on the day of the date of the judgment. That the Judge died before judgt. So. that Plff in error did not appear when his appearance is entered on the record. Cro C 12. Cro J 568. Hist 154 Hob 204 1 Roll 762. Dy 89. Cro E 469. Ray 231 - 5 Com 301 - Sal 262. 1 Roll 757.

In none of these cases does the plea "in nul=lo est erratum" confess the assignment. (supra).

General Rule. That the Deft in an action cannot assign for error, what he might have pleaded in abatement in the original action, unless he pleaded in abatement & his plea has been overruled. Carth 124. 6 TR 766. 728 Bl 267. 299. (He is deemed to have waived the advantage) vide "Pleading" division "Abatement".

When error in fact is assigned the proper conclusion of the assignment is with an "a==verment" hoc paratus &c" 1 Dac 412. Carth 367 1 Com 300. Contra Yelv 58. 2 Dac 218. & that the conclusion should be to the country. Qu. What issue would be thus formed? Ea. Infancy assigned, Plff can't conclude thus for there is no issue. no one has denied that (18)

Writs of Error.

he was an infant. Case in Yelv. cannot be Law.) it should conclude like a special plea in bar with a verification -

Coram vobis. in what cases.

Gen. rule. That for error in fact (ut ante) a writ of Error coram vobis lies - 5 Com. 286. 1 Roll 747. Ex - Cases of fine court & Infant (ante) Sal 400. 4 Dac 39. 2: 215. 218. 3 Com 177.

So if one sues & recovers judgt. as Executor or administrator to P. S. P. S being alive - 1 Roll 761 - 2 Lev 38. 1 Vent 207. Cro B. 5. (ante 15)

And although it may be carried to a higher Court a coram vobis is the most usual way in these cases -

But this rule cannot hold when the Court rendering the erroneous judgt. cannot try an issue in fact - as the Exchequer Chamber. It must be brought to the House of Lords -

1191 - But generally if the Error is in Law, a writ of Error coram vobis does not lie - Since it would refer the question to the very judges who committed the alleged error. 2 Dac 215. 10 5 Com. 286. Moore 186. 1 Sid 208. 1 Lev 149. Contra. 1 Roll 749.

Exception - When the error is occasioned by the default of the Clerk of the Court, or Sheriff or other Officer of the Court. Roll 746. F.N.B 21. Then error coram vobis lies for error in Law.

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Since in these cases the error does not proceed from any fault or mistake in the Court - it is not an error in the judg.t of the Court. If it was the fault of the Court. Error coram vobis would not lie - 5 Com 286. 1 Roll 746. l 4. No 186.

If the error is in the process error" coram vobis" lies - For this is not an error in the judg.t The judgment being rendered only on the pleadings, of which the process forms no part. If therefore the judg.t is vitiated by a defect in the process it is not a mistake in the opinion of the Court - 12 Bac 215. 5 Com 286. F N B. 21 - Dyer 181. 1 Roll 746. l 6 - Process; What? Vid 3 Bl 279 -

At what time to be brought.

Old rule - That a writ of Error tho' brought on an interlocutory judg.t could not be brought till final judg.t for the party might prevail after an interlocutory judg.t ag.t him - 1 Roll 749 -

But in Eng.d it seems, it is now settled that the teste may be before final judg.t - tho' the return day must be afterwards - 2 Bac 199. 1 Vent 255. 3 Keb 308. Latch 133 - 1 Sid 104. 466. 1 Str 280. Str 807. Com.t Amend.nt 2 C 4 - L.d Ray 1531 - (20)

Thus final judg.t may be waived & a writ of Error brot on an interlocutory judg.t & I see no harm that can result from this practice

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by which useless Technical Objections are re=
=moved.

In Conn.t the old rule prevails - (1 Root 181. 290)
& our Courts have decided that an agreement
of the parties to dispense with final judg.t
should not supersede the rule - (Conn.t R.)

By joint parties -

It is a gen'l rule in Eng.d that where a
judg.t is joint ag.t several, they all must
join in a writ of Error to reverse it - "New
Trials" 50. Carth 367 - 1 Roll 747. 5 Com. 290.
2 Bac 198-9. Sty 406. Carth 7. 8. 3 Mod 134 - And
if one refuse there must be a Summons
& Severance - For an entire judg.t must
be reversed in toto - or not at all - Incon=
venient that each should have a separate
writ (Id) -

But in Conn.t the Superior Court, & C.t of Error
have reversed a judg.t as to some of the Defts & &
affirmed it as to others - Ex - Where there was
a joint judg.t ag.t several some of whom
were adults & others infants - Reversed quoad
the infants only - as they pleaded by Attor.y
Tilb 114 -

But the Com. Law rule is otherwise - 2 Bac 198-9
228. 1 Roll 776. Co 1 289. Is not the Com. Law
rule the correct one on principle? If the In=
=fants had not been parties the damages might
have been much less -

21 - Tho' if the parts of a judg.t are separate it may

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be reversed in part - 1 Str 189. 2: 808. 4 Burr 2022. Tidd 116. 1 Root 138. Ex - When costs & damages &c are allowed, when damages &c only should be given, judg.t may be reversed as to the costs - & affirmed as to the rest.

So (according to our decisions) if the judg.t is severable - Ex - Erroneous as to part of the costs, as, where there should be no more costs than damages - 1 Root 138.
So of Judg.t tho' not actually separate is se=parated by any rule, it may be reversed as to part & affirmed as to the residue - 1 Root 138. Seen at C - L -

Who may have the writ -

No person can maintain a writ of error ex=cept one who is a party or privy to the original judg.t. Thus if the init. regards an estate of inheritance his heir after death of original par=ty may maintain writ of error.
The privy must be a person to the subject matter of the init. As heir - of an estate of inheritance 2 Ld 355. 1 Roll 747 - 1. 755. 1 Sid 317. 2 Inst 195-6 1 Sen 201 - 7 Mod B: 107 - Bro 90.
The Executor &c. where it is personal - as debt or damages.

For law or fact provides in Title "Evidence" 42.
And it is a general rule that no person that (22.)
a party to the judgment can reverse it on a writ of Error unless the error was to his disadvanta=ge or a damage to him. Fitz. N B. 21 -

Hob 70 & Co 39 — & Co 59. 2 Bac 195 — 199. 220 —

If therefore one of several Co-defts obtains judt. & the others are subjected the former can not join in a writ of error to reverse it. Those agt. whom judt. has been recovered must all join in bringing the writ of Error. — Vide Cowp 425, 2 Bac 199. Str 892. 1 Lev 210. Hob 70. Stra 190. Cowp 90.

But this gnl rule is not universal. — The prevailing party may himself sometimes maintain a writ of error.

This he may do where the error is the fault of the Court "alters the manner of judgment" This is allowed for the sake of regularity (Str 971. Hardw 51. 7 Mod 189.) in judt. —

Thus if judgment omits an amercement or a capiatur — the party for whom judt. is given — may reverse it by writ of Error.

So if on a verdict for damages & costs & the judt. is entered for damages only — the prevailing party may reverse it. 2 Bac 220. 5 Co 39 & Co 59 — Rep 211 — 1 Roll 759 Yelv. 107.

Why?

Ans — In cases of this kind the judt. is incomplete. It is in itself defective —

Again — If on a conviction of two defendants in an action of debt — the whole damages & costs are adjudged against one only — The other — or the party obtaining it — may assign for error.

Yelv 107 n. 7 Mod 189. Hardw. 51 —

And a Pltff may assign the want of jurisdiction in a Ct. in which he brot the action
2 Cranch 126

When a Supersedeas.

In England the rule formerly was that suing the writ of error to defendt in error operated as a Supersedeas of his judt in the Court below. for 4 days, (in which time he is to obtain it from the Clerk of Errors.)
1 Roll. 492.

2 Bac 210. 2 Ket 129. 1 Vent 255.

But it seems now that the writ is no Supersedeas till it has been allowed by Clerk.
1 Tr 280. 1 Dest Cal. 478. Dunn 376. 2 Bac 210

By Supersedeas is meant a suspension of the right of prevailing party below, to enforce the judt by final process or execn.

The allowance of the writ is a Supersedeas only for 4 days after judt. Refused unless bail in Error is put in within that time. If he does put in bail the Supersedeas continues. till writ of Error is determined. otherwise not 1 Tr 280.

The permanent supersedeas then is the effect of putting in bail in Error. which must be put in within 4 days after judt. signed.
1 Tr 280.

Bail in Error is put in for the security

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of Pltff below - for the satisfaction of the original judgt. in the event of it being affirmed -
In Engd. the recognizance of bail in error is with 2 sureties in double the amount of the judgt. below as it is intended to be an ample security - It is prescribed by Stat 3 Jac 1st. & by Stat 13. 14. 17. Car 2d.
4 Bac 172-3. 1 do 212.

(25) In this State (Contt.) if a cuppt. recognizance with sureties is taken it becomes a supersedeas of the judgt. & execn. below from the time of serving the writ on the defendant in Error. The Recognizance is to secure all the damages debts costs & costs (are for which Cessors become liable. 17 Wils 98.
2 Day 307 or 370.
The writ of Error it is said is good (tho no supersedeas) without bonds - Sed. qu. de hoc. L. G. conceives it to be reasonable.
In English practice Executors & Administrs. when Pltffs in Error on a judgt. to bind testators & may have a supersedeas on their writ of Error without putting in bail
4 Bac 172-3. Cro R. 350. (Aliter in Contt. no difference between them & others.) Not within Stat 3. Jac II. which requires bail, in order to make the writ a supersedeas - In Contt.
If a copy of the writ is delivered to the officer it becomes a supersedeas of the Execution - if he has execution in his hands -

(26) It is here (Contt.) subject to a plea in abatement being in the nature of an original writ -
And in 1816 - it was settled that the time for pleading in abatement of a writ of

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error is the same as that allowed for pleading in abatement of an original suit - i.e. by the second opening of the Court on the second day of the term - 2 Day 552 2 Cont. R 67.

If a writ of error abates or dis= continues thro' the fault of the Plff in Error a 2d writ of Error. and not by him is no Supersedeas -

But if a Plff in Error is non suited he can not even have a 2d writ of Error - Salk 263 - 2 Bac Abg. 1 Keb 658. L Ray 97. Comb 19 393 -

Reason is he abandons his right to complain

But if the writ of Error abates by the act of God - as by death of Plff in Error - or (in Eng.) of Chief Justice - the rule is different - (In Eng. this writ is not subject to plea in abatement - not an original writ) - 1 Keb 658. 686. Yelv 208.

How far amendable.

Writs of Error are not within the Statutes of Jeofails + Amendments - (Stats enacted to cure or rectify slight mistakes or errors) For the object of these Stats is to affirm the judt + guard agt its reversal - that of the Writ of Error directly the reverse -

But now by Stat 5 Geo 1st a writ of Error -

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may in England be amended so as to con=form to the Record on which it is founded 5 Mod 16. 69. Salk 49. Carth 520. Comy D. Amend 2 C 4. 2 Bac 202. 209. n.

A writ of Error does not abate in Eng: by the death of Deft in Error but a Sci: fa: may issue agt his representative (according to subject matter of suit) to show cause why judt should not be reversed - Abiliter si Pltff dies.
This rule must be founded on the statute 4 & 5 Ann.
2 Bac 207. - 9. 1 Vent 34 - Sal 264. Yelv 208. Carth 236. 293 -

(27) The allowance (we have seen) of a writ of Error is not stricti juris. it may sometimes be disallowed - It is to prevent writs of Error being taken on mere fri=volous pretexts - Allowed by Clerk of Crown.
Here. Judge examining Record & if he sees no ground for writ of Error - he will not sign it.
1 Roll 492. 2 Bac 210 - 4 do 681 - Salk 264. 321. 2 Sw. Pract. 277.
Vide Bills of Exceptions 5. b. "New-Trial" 47.

Debt on judt may be sustained not=withstanding a writ of Error pending on the same judt for though the execution is sus=pended the debt or duty remains -

An erroneous judt is binding until it is reversed by due course of Law. 1 Roll 742. c 35

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7 TR 458. 3 Wils 345. 1 Lev 153. Ray 100. 8 Co 142. a & b. 1 Rost 176 - 2 Wm 490. 2 Dac 211. Dy 32 pl 5. 1 Sid 236 - 1 Lev 153. Ray 100. 8 Co 142 a 142 b. Skin 388. 1 328 Comy 177-8. Rost 176.

But tho' an action will lie on the original judgment notwithstanding writ of Error yet it is discretionary with Court to stay the proceedings in it till the Writ of Error is determined - 28.

2 TR 78

If a 3d person obligates himself to pay what shall be recovered in a suit agt AB. & judgt is recovered agt AB. but a writ of Error is brought by AB. the 3d person may plead the pendency of the writ of Error in bar of an action agt him on his obligation. because it is not yet ascertained whether he will have to pay anything - as the suit against AB. is not determined

2 H Bl 372.

When Judgt on exr below is completely executed - as by taking Defts body in execution & committing him to prison, the writ of Error is not superseded. 4 Dac 670. 7 N.R. 237. 1 Vent 30.

So. if Exn has issued - & property has been seized upon the Exn & sold according to Law a writ of Error will not affect the validity of the sale - no supersedeas. 1 Vent 30. (4 Dac 684 Hob 7 This is agreeable to

If Ex^n. has issued, & goods are taken & not sold. according to 2 Roll 491 - 2 Dac 210 - 11 - 370. the writ is a supersedeas - & the goods are to be restored - But this seems not to be law - For Execution when begun must be completed Yelv 5. 4 Dac 084. Ven 255. Salk 147. 323. Ld Ray 990. Cro E 597. 2 Lev 370
All the acts under the Execution have relation to the first The Execution is indivisible.

(29) According to our practice - an erroneous judg^t. is as to the original bail as a final judgment. i.e. - the original bail, if not subjected by the first judgment, are not liable on its reversal - 2 Sw. 175-6. Rost 567. 2 H Bl 372. analogous - This rule is founded on the construction given to our statute - Seems in Eng^d. 1 Dac 212. Cro J 94-5. Stra 419. 526.

If Plff in Error does not assign errors, judgment is not affirmed (reversed it certainly cannot be) But the first judgment remains good (i.e. nothing is done upon it) Deft in Error therefore does not recover costs on the writ - But must resort to the bond - 2 Dac 216. Sid 294. 2 Feb 52.

This rule is not applicable to our practice - Errors are assigned here when the writ issues In Eng^d. a. I suppose after the return of the "Sci fa. ad audiendum errores"-

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Effect of Reversal.

A reversal of judg.t in some cases overreaches & avoids the proceedings (on the execution) under the original judg.t. In others it does not - See Rule page 31 ✱) Ex. If goods are taken on the execution & kept till reversal, by the officer - or if goods or lands are delivered to the creditor at a valuation & judg.t is afterwards reversed - the property is restored to the deft. in the execution. The Pltff in error. 2 Bac 231-2 370. 1 Roll 77-8. or 778. Yelv 179. Cro J 246. See 3 Com 177. 3 Leon 89. 3 Mod 325.

✱ The rule laid down by L.d Coke is that "collateral things executed" are not devested in a reversal. "Collateral things executory" are - 8 Co 142 a & b.

But if Shff had sold goods on execution according to law to a stranger the sale would be valid - This rule supposes that the Shff is required to sell them. The Law will not vacate an act authorized & enjoined by itself - Cro E 278. Cro J 246. 3 Leo 89. 2 Bac 231-2 Yelv 138. 8 Co 143. Mod 573. (31)

What is the remedy if deft is beaten? He may recover in damages to the amount of the goods sold
8 Co 143 a. Cro.s 246.

So too, if one on execution escapes & the original judgment is reversed before judg.t ag.t Shff is executed, the action for the escape is gone by the reversal of the 1st Judg.t. For "Nul tiel record" may be pleaded to it by the Shff -
But if judg.t & ex.n had been obtained vs the Shff before the original judg.t was reversed

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then the judt. by him is not reversed by the reversal of the original judgt. because the collateral thing is executed - the time for pleading not till record is past. 8 Co 142a. Saund 98.
But in this case the Plff may be relieved agt. execution by audita querela. which is a writ relieving agt. execution -
Cro J 646. 2 Bac 231-2 -

But if the Plff has been compelled to pay on the execution what relief has he, after the reversal of the original judgt.? By Bill in Equity. I.G. knows of no other. ※
1 Madder Ch 131.

Suppose that on the original judgment proper=ty has been taken & delivered according to law at an appraisal into the hands of the plff in the suit here in satisfaction of his judgt. & afterwards the judgt. here is reversed - Is the property to be restored - I. Gonzer thinks that it is. No harm can be done him. for he is no longer entitled to it -
4 Co 143b. Cro J 246. Yelv 179. 108. Brownlow 107-8)

※ If this is not the remedy I suppose that Plff below must have a new action - but there is no such case.

So if as above the Plff on execution has sold them to a stranger & then the judgt. is re=versed. Now. will the vendee hold the goods. or not. or he must look to the title of Vendor. he must take his reme=dy on warranty of title ex=pressed or implied. If there is none - it is

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his Cols - Cro J 246.

If Shff has taken property on execution & sold it to stranger when he has no author= =ity to sell it - was not by Law bound to sell it - a subsequent reversal will devest the right of purchaser to hold it - devest the sale - it must be returned -
2 Bac 232.
Thus if a judgt of outlawry is rendered agt. A & B. & on an execution of "capias utlagatum" the Shff takes goods of outlaw & sells them & then the outlawry is reversed There the sale is not valid. it creates no title - For the Shff in selling them acted without authority - He is required to keep them, & not sell -
1 Roll 778. 5 Co 90. Cro. E 278. 3 Bac 778

In this State (Connecticut) a writ of Error is bared within 3 years from the time of rendering final judgt. below. 33
1 Root 54. In Eng. the limitation is 20 yrs.
Tr 837. 2 Bac 200. Under Stat 10 & 11 Wm 3d.
5 Com 290.
By Statute of U. States the time for bringing writ of Error is ten years.

When judgment below is affirmed on writ of Error. the Deft. in Error recov= =ers his costs on the writ of Error in his costs above - When it is reversed no costs are taxed on the suit in Error. on either side - Plff in Error does not; because Deft in Error is not con= =sidered to be in delicto for not abandoning his judgt. below.

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When j.t of reversal puts a fin:
al period to the controversy the Plff in Er:
:ror recovers his costs below under the name
of damages.

Now in most cases where deft brings
a Plff in Error & reverses j.udg.t below.
this reversal will generally put an end
to all controversy. but not always.

Examples
Judg.t below on demurrer to declaration
was for Plff. deft brings writ of Error
& reverses judg.t for insufficiency of dec:
:laration. This puts an end to the con:
:troversy.
On the other hand When judg.t is for
deft & Plff below reverses it. In
most cases the judgment of reversal does
not put a final close to the con:
troversy. Ex. On a demurrer to dec:
:laration the judgment below is for deft.
the Plff below reverses it on Error. This
only proves that declaration is sufficient:
but he has no judg.t for damages or
property. He therefore has a right to
enter his suit de novo in Court
above or to have it remanded to the
Court below to be there tried (Pow. 35-37. Cases 4. 8. 10.)
In an Interlocutory Judg.t the effect is the
same. it does not decide the merits of
the controversy. In point of Law he has
a right to try it again.

This may happen where there may be

Writs of Error.

Reversal & reversals of judgment & yet the merits may not be decided - In Conn.t the whole costs follow the final event. 1 Kirn.t R. 150.

But where he does not proceed to further trial by Entry he is not entitled to Costs. 1 Conn.t R 150.

If Pltff in Error has paid any thing on the erroneous judgment he may recover back the sum under the name of dama-ges on the reversal. And is also entitled to the costs that ought to be awarded him (34)

But he may go for the reversal only & recover back money he has paid in an action of Ind: Assumpsit. vide Assumpsit II -

But if Pltff in Error has paid nothing he recovers nothing but the costs he was enti-tled to on the reversal of the judg.t or on the judg.t of reversal -

But where the case requires further trial & Pltff enters for another trial, the costs await the final event. 1 Conn.t R 150.

Under our Statute when judgm.t is af-firmed the Deft in Error is entitled to interest on the original judgment at the discretion of the Court. The rule is the same as in Eng.d

1 Bos & Pul 29. 2 H Bl 284. For the writ of Error has superseded the original judg.t & delayed collection of it But tho' the rule leaves this to the discretion of the Court - yet in our practice the Court always award - as a matter strictis juris -

But interest is not allowed according to English practice agt. the bail in Error Doug 723. 2 Str 57. 78. in debt on recognizance

Rule of practice in Conn. that when on reversal the Plff in Error would enter his suit in the Court above for trial he must do it in the same term in which he obtains the judgt. in Error.
1 Root 85 And also that the writ of Error must be brought in the same county in which the original judgt. was awarded. 1 Root 259.
As now of writ of Error in Ct. of Errors.

According to practice in Connt. writ of Error must be signed by a Judge of the Court to which it is returnable. 2 Tr 277.

In Connt. if on "nul tiel record" the copies are claimed to differ from the record, the Court will order the original record to be brought up. Root 88.

35.) Cases exemplifying the effect of an affirmance or reversal of judgt. on Writ of Error.

A vs B.
in the Court below.
Case I. Judgment below for A to recover of B. $2: debt & $1: costs. Judgt. reversed, for overrecovery of the declaration before A was collected any part of his execution. Judgt. above is, that judgt. below be reversed & that B recover of A. $1: the amount of the costs incurred by B in the

Writ of Error.

Court below. But no costs are recovered by B. on the writ in Error. For Plff in Error never recover costs accruing on the writ of Error.

II. The case as before except that A has satisfied the contents of his Execution. viz $20. debt & $10 costs. Judgt. of reversal as before and that B recover $40. viz the $30. paid to A. on the erroneous judgt. & $10 costs which B ought to have recovered in the Court below. Assumpsit 11.

III. Judgt. below in favor of A as before. affirmed in the Court above. Here the judgt. above is that the judgt. below be affirmed, & that A the Deft in Error, recover his costs on the writ in Error. The judgt. below is again operative. Interest is allowed on the orig. judgt. if the Court in their discretion think proper & execution issues for it. The practice is I believe to allow it of course. Stat. Cont.

IV. The judgt. below was in favor of B the Deft below. A by writ of Error reversed the judgt. The judgt. in this case is merely a judgt. of reversal. If the Court above is competent to try questions of fact (as Dr in Eq. & Sup Ct. in Cont.) A on the judgt. of reversal enters the cause in the Court above, for trial, & on final judgment if he prevails, recovers together with his debt or damages all his costs, which accrued before the judgt. of reversal as well as those which have accrued since. Will he recover no costs on the writ in Error if A had paid the costs taxed

3d.

against him on the judgt. below he would have recovered that on the judgt. in Error as damages. But A must enter the action if at all, in the same term in which the judgt. of reversal is rendered. 1 Rost 85.

V. The Court which reversed the judgt. in this last case was not competent to try questions of fact (as the Exchequer Chamber in Eng.) the Court of Error in Contr. The cause is either re-remanded to the Court below where it must be again proceeded with. or if it is ripe for final judgt. it will be ended & execution issued by Ct. of Errors. Decided Pleasant & Crocker vs Chester. Court of Errors 1863. 1 Day R 27. 152. Bro Ent 30. 2 Day 10. Carth 319.

VI. Demurrer on the Court below to the declaration. declaration adjudged insufficient. On writ of Error the judgt. is reversed. Here it would generally be absurd for A to enter. since his declaration is adjudged insufficient. Still he may enter. if that if his declaration can be helped by amendment he may have an opportunity to do it. Unless in Sup. Court. And the deft below never wishes to enter for trial.

VII. Declaration in the Ct. below adjudged insufficient. Reversed on writ of Error. Here A enters for trial if the Court above can try questions of fact. For he has a good declaration & the merits have not been tried. Since the

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Writs of Error.

Court above has rendered only a judgt. of reversal, not a judgt. 'good recovery.' And the Court above cannot on the judgt. of reversal ascertain the damages.

VIII. Plea in bar demurred to below, & adjudged sufficient - Judgt. reversed - A enters for trial for as yet there is no judgt. for A to recover. & on the face of the Record, he has for aught that appears - a right of recovery.

IX. Plea in bar adjudged insufficient below. Judgt. reversed - If A should enter - it would be to no purpose - B does not wish to enter. For his object is only to defend & that object is attained by the reversal.

X. Plea in abatement - judgment below that the writ abate - Judgt. reversed above - Plff enters for trial. For he has a good writ; & has a right to prosecute to final judgment.

XII. Plea in abatement as in the last case. Judgt. of 'no recordat' entered in the Court below - Reversed in Error. A cannot enter: for he has no writ. (May he not enter if his writ can be aided by amendt. as in case VII.?)

XIII. If Error is brought for the admission or rejection of evidence: Plff below may enter for trial, on reversal (whether he is in error Plff or Deft.

Writs of Error.

& whether the judg.t of reversal is for or against him.

Ex. A's witness was excluded below. On a bill of Exceptions the judg.t is reversed. A enters for trial. Here he is Pltff in Error & the judg.t in error is in his favor.

B's witness was excluded below: Judg.t reversed. Here B is pltff in error. & the judg.t of reversal is in his favor. Yet A may enter for trial if he pleases, for he may possibly prevail notwithstanding the admission of B's witness.

Note. In all the above cases in which the original Pltff is supposed to enter for trial, on a reversal of judg.t the Court above is supposed competent to try questions of fact. If this be not the case, the Record is remanded to the Court below & there the final trial is had (See IV & V Cases supra) Stat. Conn.t

When the judg.t in error puts an end to the litigation between the parties, the action is never entered in the Court above, nor remanded for trial; The litigation is always ended when the judg.t is affirmed. But it is in many cases otherwise on a reversal of judg.t.

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New - Trials

The mode of obtaining a new trial in Eng^d (45)
is by motion made after verdict & before
judg^t.
On this motion the regular course is to ob=
=tain a rule calling upon the party in
whose favor the verdict is, to shew cause
why new trial should not be granted.

The granting of this rule suspends the judg^t
&c. prevents it from being entered up, till
the motion is disposed of. & the reasons of
the motion are afterwards discussed before
the court sitting in Bank -
It may be granted at any time before judgment.
Bony 760.

In this State a new trial is sometimes
obtained in a petition to the Court or of mo=
=tion - Formerly by application to legislature
(Kirb 183) on petition Stat. Conn^t.

Again - The granting of new trial here dif=
=fers from the English practice in other respects.
A new trial here is often had after
final judgment is rendered in pursuance
of the verdict.

When the ground of the motion is any
matter which occurred at the trial
as any interlocutory judgment of the judge
The application is made by motion. not

New Trial.

on petition when application is grounded on any thing arising after trial as on discovery of new & material evidence

Civil Cases. There was no time limited in this state within which the application for a new trial must be made but it is now limited to 3 years by Stat of 1804. Comm. -
The petition states the grounds of the application & the opposite party may demur to or deny them.

(46) But the petition is no stay of the proceedings tho' the granting of new trial does. It is accompanied with a summons to the adverse party & is signed & served, like petitions in Chancery. The application for a new trial is according to Civil rule an appeal to the discretion of the Court. (part 52) Thornton gen'ly new trial is not granted where justice has been done. 2 Wils - 306-7. Bull 326. 3 East 451. 1 Bos & Pul 338.
But where a point is raised in the Judge on the trial the determination of that question is strictly juris. It involves no discretion. In such case the Ct. considers itself in the situation of the Judge at N.P.
Where Court has decided & wrongly decided a point the application for a new trial is to the discretion of the Court - But when Judge at N.P. reserves the point at law for the determination of the Court in Bank. The determination of this point is strictly juris.
Ex. On trial of a civil evidence of a certain kind is offered which is objected to. Now if it ought not to have

Trials.

been admitted. (tho' the objection to its admissibility is overruled & the evidence admitted, yet the application for a new trial is to the discretion of the Court. But if Judge admits it. saving the point of Law. it is then strictly jus. 2 Wils 306-7. 1 Bos & Pul 339. Bull 326. 3 East 451. 1 Bos & P. 338.

This discretion enables the Court to refuse its interposition when justice does not require it. tho there may have been a deviation from the strict rules of Law. Hence in what are called "hard cases" the Ct. will not grant new trial. 3 Bl 391. 2 - Inst 2. Salk 116. 644. 646. 648. 1 Bos & Pul 338. 1 Burr 394 or 399. 2 TR 405. See 4 TR. 469. When Ld Kenyon speaks of a presumption raised by the Jury - contrary to evidence - in which case no new trial, if the verdict is according to Equity & conscience This rule does not apply in all cases. (Port 51. 61-2 - 67) - On this principle it is that a new trial will not be granted to deft to let in the defence of Wrong

In pen'l again. it will not be granted to aid the defence of infancy of coercion or any unconscionable, illegal or defence in general - 1 Bos & P 52 - 454 - 1 Bl R 35. Str 1242. (Port 67-8) -

How far a new trial will be granted to assist a party in taking advantage of Statute of Limitations is not clear - See 1 Bos & Pul 228. 3 T. R 124 -

In consequence of this discretion the Court in granting a new trial has the power of imposing terms or conditions on the party applying for it - not on the other party.

New Trial

(It is Equity - Maxim is he who would have Equity, must do Equity.)
Ex - Discovery of certain facts under oath - Admission of facts not intended to be litigated - Production of books, papers &c -
Is too again - where the testimony of the party to whom the application is made depends upon witnesses who are interested who are going abroad &c the Court in granting a new trial may impose as a condition that the depositions of such witnesses be taken -
3 Bl 392. 2 Atk 148. 7 DR 529.

A condition of this kind seldom is wholly unnecessary in Com.t for depositions may (in civil cases) be used as of course or right -

47) In English practice if the ground of motion is any thing which passed on the trial, the information of the fact on which the Court in Bank must act is generally taken from the Report of the Judge

But if it is any thing which did not appear at the trial the fact is to be discussed in affidavit - as that one of the jurors was interested in the trial &c.
3 Bl 391 - 1 Bid 235. 2 Lev 140.
(Com.t practice is somewhat diff.t. Our Courts all sit in Banc, we have no Nisi Prius Courts.)
I remarked under title "Writs of Error" - that Error is not precludable of the decision of the Court in granting or refusing a new trial - not if it be granted in cases in

which there can be no new trial (under any circumstances) as in one tried for felony it must be found for Error. Post 76
2 Bac 304. Tidd 41. "Bills of Exceptions" 5-6. "Writ of Error" 27-
Judge Gould apprehends that the power of granting new trials is limited altogether to the Westminster Courts. that inferior Courts have no power to grant them -
In Comm.th New Trials are granted by Statute only by Superior Court & County Courts. Stat Comm.th "Actions Civil." Tidd 9. The Stat. does not extend to single magistrates -

The practice of granting new trials was unknown in what may be called the ancient practice of English Courts. The only remedy was in a proceeding by attaint - by the Jury for their verdict. Blackstone traces practice to reign of Edw.d 3.d Adds that it did not prevail till the time of the Commonwealth - (1655) (48)
3 BC 387-8. Stra 601. 3 BC 387-8. 1 Bac 394. Sal 648. Bac "Trial" L 1. Stra 462. 1 PW 213. Str 995. Lawes The cases in Edw 3.d 6 were for misbehavior of Jurors. Those in time of Cromwell (1655) were for excessive damages, affording a presumption of misbehavior - Fine for various causes. Of late years new trials are granted after trials at Bar - (i.e before the whole Court) sitting at Westminster, & for same reasons as after N.P. trials - (post 5) Formerly held contra - except in single instance of misbehavior of Jurors.
1 Bac 395 Stra 585 - 1105. Bac 848. Trials L 2. 2.d Ray 1300. 1 Tidd 58. Sal 648. 7 Mod 37.

New Trials.

(49) The general principle now is -
That in all cases of insufficient importance new trial shall be granted if it can be made fully to appear that justice has been done at the first trial. If of small consequence new trial is not gen'ly granted 3 Bl 388. 392. 1 Burr 395. 4 Tr 638. 11 Mod 202. Bat 62. It not being strictly just - & the "play not being worth the candle".
The object is the attainment of justice & equity.
1 Burr 395. 3 Bl 388. 392. 1 Burr 12. 665. 2193 - 4 Tr 58. Bac Trial L 4 -

It is a gen'l rule in English practice that a motion for a new trial can not be made after a motion in arrest of judg't. But the rule does not avoid "a second" - Bac 647.

The reason assigned is in that if judg't is arrested the granting of a new trial would be nugatory. Tho' there is an exception viz "where the cause for new trial was unknown at the time of moving in arrest" - Bac Ab. Trial L 1. Bull 325-6. "Rule not universal"
(50) It was formerly held that where there were several Co-defts. & all ~~[illegible]~~ convicted, or part convicted & part acquitted, no new trial could be granted in favor of one or a part of them, for the verdict, it is said, must stand or fall in toto - Bull 326. 3 Salk 302. 12 Mod 275. 3 Term 609. 2 Stra 814.
Rule seems to have been overturned by Const of Trial's Bench in time of L'd. Mansfield.

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New Trials

6 Mo 619 538.

Causes for granting new Trials are va=
=rious.

1st. Want of due notice of Trial to the party on whom the verdict is found is a ground for a new trial.
But if Deft has appeared & defended he can't have a new trial for this cause He waives the defect of notice.
Salk 646. Bull 327. Bac Ab Trial L 1, Salk 435. 428. (or 428 435)
This rule does not mean the want of due service of the writ.
but the want of notice by the Pltff to the other (Deft) according to the rule of practice that he will bring on cause in such time. Here it is not necessary. (51)

2d. A defect in the Judge. or a mistake made by him in point of law.
Bill of Exceptions is a concurrent remedy.

Ex of defect.
If the Judge was interested in the suit or stood in such a relation to the party as would disqualify him.
11 Mod 119. 5 Bac 244 Ex. of Mistake.
If he improperly admits inadmissible evidence or vice versâ.
Bac Ab Trial L 3. 6 Mod 242. 7 St. 53 & 64. 10 B. 202.
So also. for a misdirection of the Judge to the Jury in point of law. A Bill of Ex=
=ceptions may also be filed Bull 322 4 T 2 753.

New Trials -

New Trials for a mistake of either of these kinds have been granted after a trial at Bar. (when made by the whole Court) (Burr 395. Str 585. 1108. ante 48) Not common -

In Comm. there is no such thing as a trial at Bar -

It may not be improper here to consider For what causes are Trials at Bar allowed? -

The grounds are the qualities of great value, notable length, & probable difficulty in the trial Doug 420. Not a matter of right -

(52) No new trial for misdirection in Law, if justice is done. 2 TR 5 (ante 46)

The improper admission or rejection of evidence is a good ground for a new trial yet when a witness has been admitted who was incompetent but not objected to at the trial this admission is not a substantive ground for a new trial tho' the incompetency was not known at the trial -
1 TR 515. Peake's Ev 187 (Post 72-75) -

In Comm. however a new trial was granted on this ground. The evidence not being objected to at the trial - Pannelle v Landon - Nov. 1790 -
It is said that if a cause has been tried by the testimony of a person legally infamous - a new trial may be granted

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in Equity. Pr. Ch. 194. As for reason in resorting to Equity see 1 Burr 394-5. The rule of Law is contrary to this. That no new trial will be granted -
Salk 653. 1 Str 717. 1 Bos & Pul 430. n. 12 Mod 534

But we must understand the rule as contemplating a case where the objection was not taken or not established at the trial
1 Str 717. 1 Bos & Pul 430. n.
(For a person legally infamous may testify truly).

Although a witness called to prove a certain fact is improperly rejected yet if another witness testifies to the same fact or if it was not contested, a new trial will not be granted
3 East 451. - Held in Eng. that incompetency of witness arising from interest, discovered after trial, is not per se suff. ground for granting a new trial - 1 Str 717. Peake Ev. 187. - This in Conn. -
3. For any defect or incompetency in the Jury or in any single juror.
If a juror might have been challenged as incompetent, at the trial but the fact was unknown to the party on whom verdict was. The party subjected may have a new trial - See "Arrest of Judg."
Bac Ab. "Trial" L 4 7 Mod 54. 1 Vent 30. Style 129.

But it has been determined in our Court that if the cause of challenge is such as does not affect his impartiality, no new trial will be granted. as if juror is incompetent as not being a freeholder. But if he had been a near relative to the party in whose favor verdict was it then would be ground for new trial. 2 n.

New Trials.

n must have known of the cause of challenge at the trial.
53 In this state C.t motions in arrest of judg.t have been concurrent, where ground of new trial was that in the last case. See "Pleadings" –

4.th Misconduct on part of the jury. Bribery, an improper practice, 'any thing' which conduces to show that jury acted partially. So inattention or or referring issue to chance –
Bac Ab "Trial" L 4 2 Lev 140. Sira 642 Bac Ab "Verdict" H. Jon 83. "Pleadings" 17 –

And in a particular case where the foreman of the Jury declared before trial, that the Plff should never obtain a verdict whatever his testimony might be –
Salk 645. Bac Ab. "Trial" L 4

54 In very early times perfect unanimity in the jury in finding a verdict was not requisite. But for a long time past it has been necessary. 3 DL 375-6 & if they are not unanimous a new trial must be granted.
And in English practice Court have a singular method of enforcing unanimity & in some of the U S. by carting the Jury, from place to place, wherever the Judge goes. And the Judge will not discharge them till they agree.
Bac Ab "Verdict" F. 3 DL 375. 6.

In this state they are usually discharged in case of invincible disagreement, at the end of the term, but not before. except by agreement of parties. Qu? if agreement of parties is

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New Trial -

now necessary? -

If the Jury are not ultimately unanimous the verdict is, in strictness, ill, & a new trial must be granted. A Verdict of eleven has been set aside in Eng.
Bac Ab "Verdict" F.

But an expedient has been adopted both in Eng. & in this state, to relax or evade the rigor of this rule. this is done by permitting the dissenting juror to come in silent, the verdict being delivered in writing by the foreman. Ray 100. Cont. 14. Trial 448. 141 Contest 14. Bac Ab - Trial L 4. Verdict F 2 Wils - and they are not afterwards allowed to testify to their dissent. (55)

By the rule of Com. Law - as soon as an issue is delivered to the Jury, they are to be locked up in some apartment by themselves - and they are not to eat or drink without the permission of the Court. Their eating or drinking does not destroy the verdict but subjects them to punishment - to a fine - Ris 33
Bac Ab. Verdict F. 3 Dr 375. 1 Ventris 125. 1 Co Lit 227. 12 Mod 111. 1 Leon. 132. 2 Ray 148. Sty 218.

If the Jurors eat or drink or accept of any refreshment from one of the parties, & then find the verdict in favor of that party. the verdict is bad & there must be a new trial -

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Bac. Ab. "Verd." K. 1 Vent 125. Co Lit. 227. 12 Mod 111
In Cont. the jury go where they please. The practice is a very bad one & contrary to direct Statute Law. 1 Con't R. 401-2.

(56) For the purpose of relieving jurors from hardship or confinement & attendance till a verdict is delivered to the Court. Courts have devised what are called privy verdicts, written & delivered sealed to the Judge out of Court. Bac. Ab. "Verdict" B. Co Lit 227. Blond 211. 3 Bl C 377. Br 217. Vile 33.
But not the privy verdict does not bind the Jury. They are still at liberty to give a public verdict opposed to the first. Bac "Verdict" B. Co Lit. 227.

The Jurors eating or drinking after a privy verdict delivered at the expense of one of the parties does not vitiate the verdict unless they change it in favor of the party treating them. If they do thus change it, it will be set aside. 1 Vent 125.

No occasion in Cont. for privy verdicts as Jurors go where they please. Eat & drink at their leisure & pleasure. Lord mirandum. 1 Con't. R 401-2.

(57) Privy verdicts are admitted in all civil cases & in some Criminal but a privy verdict. can never be given in case of Treason. of life or member or where the personal appearance of the party is necessary to his conviction. (as in Felony &c) Bac. Ab "Verdict" B Dyson 193. 1 Vent 97. 2 Ven 287 & 297. Co Lit 227 a.

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New Trials.

Vaughan (147.) says that a Jury have a right to found their verdict partly (or wholly) upon their own personal & secret knowledge. This seems not to be law. The very oath of a juror forbids it. 3 Bl 374-5. Dac Ab Verdict H. 1 Sid 133. But a Juror has no right to communicate his secret knowledge to his fellow jurors - & if he does it will vitiate the verdict.

The result then is this. If any Juror empannelled on the Jury is acquainted with any facts, he is to make known his knowledge to the Court & be sworn as a witness - & then he may still act as a Juror.

1 Mc Nally 238. 3 Bl 374-5. Again Each of the parties has a right to cross-examine witnesses on him - (If the Jury receive his testimony it is the testimony of a 3d person not under the witness's oath) 1 Sid 133. Dac ab Verdict H -

And once more. The true rule is inferable from the fact that New Trials must be granted and frequently are, because verdict is contrary to evidence. (Post 60).

Again The Jury have no right to re-examine in their chamber any witness who has testified in Court - & if they do the verdict is bad - All evidence must be delivered in open Court - that opposite party may cross-examine & rebutt it. (56)

New - Trials.

Cro E 189. 411 - If they disagree as to what he said They may come into court & have him re-examined there -
If the Jury take with them any writ= = ten evidence not exhibited at the trial the verdict is bad - and a new trial must be granted. Stil 235. Bac Ab Verdict H.

Nor have they a right to take out any written evidence (tho' it has been exhibited at the trial) without con= = sent of parties or of the Court Co Lit 227 - If they do it is a high misdemeanor.

But there is a strange distinction laid down viz. That if the writing furnished evidence for both parties the verdict is good - but if for that party alone in whose favor the verdict is it is bad.
Bac Ab Verdict H & Ld Raym 148. Cro E 411 - 12 Mod 250. 2 Roll 714.

In Cont. It is the practice to deliver to the Jury all the documentary evidence with= = out any mutual consent or leave of the Court.

(59) When Jury are guilty of misconduct they are not allowed themselves to tes= = tify to that fact - Evidence must be derived "aliunde" 1 Str 11 - Burrow 438. 441.
Not formerly the rule Cro E 189. 5 Bac 288.

New Trials

But Judge Gould conceives the principle of this rule to be that no juror can testify to his own misconduct - "Nemo audiendus est for an unprincipled juror might set aside the verdict -

If the Foreman delivers a wrong verdict by mistake it may be set aside, & a new trial granted -
The other jurors are admissible (or compellable) to testify to the fact - 1 Burr 383.

In Connt. held that any one juror is inadmissible to prove misconduct of fellow jurors for the purpose of impeaching their verdict 5 Connt. R 348. Qu: -
In Connt. a motion for arrest is concurrent with new trial, when the jury have misconducted (ut supra.) See Pleadings, division "Motions in arrest") -

V. Jury's finding a general verdict when directed by the Court to find specially is not illegal conduct. Not per se a ground for new trial. For the Jury are not bound to find specially - (This direction is generally founded on the application of one party, or both)

But if the verdict is against the opinion of the Court, new trial is granted. Bac. Trial & 4. (6)
Vt. R 213.

New - Trials.

New Trial in such case refused in Filed. 37. But because after trial at bar. in which cases new trials were not easily obtained formerly.

VI. Verdict being contrary to evidence is cause for new trial. / both in Eng.d & Conn.t (2 Sw. 272 - Contra a, to Conn.t 2 Stra 1105. Ball 326-7 - Comyn 3. Bac. "Verdict" H. - "Trial" L 4 - 1 Conn.t R 472. (So. now in Conn.t by stat.) Not granted if the "scales of evidence hang nearly equal" The evidence or the verdict must be Conn.t ~~a arts a ii exp.~~ strongly preponderate 3 Dc 392.

It has been said that in this case, there must be either no evidence in support of the verdict, or so little as to amount to nothing. Stra 1142. two cases 1106.

(1) But this is not now the rule. The principle now is. that the Court may & ought to grant a new trial if in the opinion of the Judge, the verdict is clearly against the weight of evidence. Ball N P 327 - Bac Ab Trial L 4. 13 Ames 322. This is not destroying the trial by jury. but only referring the issue to another jury.

VII. If the Jury have given a verdict contrary to Law, upon a given state of facts a new trial is granted -
2 Salk 646. Comb 402. 2 Bl R 1078. 2 Wils 307-8 Str 425 4 Tr R 470. 1 Johns R 279. 2. Tr. 5. 5 B 425. or 525. (In 1 Ray 147. in. whether the verdict was against Law.
But in this case a new trial will not be granted if the case is a hard one i.e

New Trials.

where justice has been substantially done
2 Tr 5. - 6 Tr 425. & 525.

It is now a rule that if in point of Law (62)
the Plff was entitled to recover nomin:
: al damages only, & the Jury have found
for the Deft. a New Trial will not be grant:
: ed - 4 Burr 2093. 4 Tr 758. Bac Ab. Trial L4.
Note 49. for the case is too small & besides justice
is substantially done.

VIII. Smallness of damages - found by the
verdict - is in some cases a ground for
a new trial - But this ground has never
prevailed (I believe) except in actions
on contract or for some sum certain. As
on a promissory note &c

But where the damages are merely presump:
: tive (in Tort) an application for a new trial
has never prevailed - The objection to new
trial is that there is no criterion.
Bac Ab Trial L4. Strange 940. 1051. 4 Tr 655.
Bull N P 327. 1 Burr 332. 2 Tr 366.

It has been said - that there is
no reason why new trial should not be granted for
smallness of damages in case of Tort - & L. C. is of the same
opinion (2 Burr 354 Fico E.)
Where Jury have made damages too (63)
low through a mistake in point of Law.
or in point of fact as by computation.
or if there is any unfairness. a new trial may
be had - Tr 425. 1259. Sal 647. But in

this case - it is granted on the score of mistake or fraud.
IX. On the other hand - If the dam=
=ages are excessive - good cause in both Contracts & Torts)
Formerly held contra in case of torts.
Str 426 - Bac Ab. Trial L 4 -
Comberb. 5 Bull 327.

But this doctrine has not prevailed -
Now in case of Contracts there can be
no difficulty - In cases ex delicto -
the rule is not so definite, but new trials may be granted
Bac Ab. Trial L 4 - 5 Str 529. 1 Str. 277. 5 Str 257
4 Str 657. 2 Wils 244. 405. 3 Str 62 Str 691-2.
1 Burr 609. 3 Str 1846. Sal 649 - Cowp 357 - Cowp 231 -
It has been sometimes contended that a new trial will not
be granted unless the excessiveness of damages will raise a
presumption of partiality in the Jury - From the current
of cases - it seems not necessary, tho' some of even the modern
cases look that way. Cowp 231 - 5 Com 155 -
This case of excessive damages is the
converse of the last Case -
Where there is a fixed rule of damages
& a mistake has been made in compu=
=tation by the Jury so that the Plff obtains a verdict for
more than is due - a new trial may be had -
But if the Plff will remitt the excess upon
the Record he may prevent a new trial -
& when the sum is certain there is no difficulty in doing
this - (as in an action on a note or bond) 2 Str 113, 123.
Ch B. 213 - 1 Str 88. Cowp 571 - Bayl. 98 2 Wils 282. 1 East 637
(see Post 73) - So - if the mistake is occasioned by Plff's
misconduct - Ch B. 213. 1 Str 88. Id -
64 In Conn^t. a new action has been grant=
=ed when on an action of book debt
the Deft suffered a default & the Plff
took judg^t for too much - This was for a fraud upon

the party & the Court.
But in case of Crim. Con - new trial has never been granted - for this cause - ie for excessive damages. 4 TR 651 (or 4 TR 561.) 1 Burr 609. Bac Ab Trial L4.
See 4 TR 654-56. where L^D Kenyon entertains a doubt whether Court have a power to grant a new trial - But Ch Justice Buller holds that the Court can for that cause as well as for any other. 1 TR 277 -

New Trials have been granted for this cause in Assault & Battery - in False Imprisonment also. 1 TR 277. 5 Ib 257.

It does not appear that a new trial has (165)
ever been granted for excessive damages in action by Parent for the seduction of his Child - 3 Wils 18. 2 TR 5. 167.

It seems that a new trial may be granted for this cause in an action of Slander. (In principle no possible reason why a new trial should not be granted in any case) ie for this cause) 5 Bac 250 pl 90. Salk 644. 1 Burr 394. 2 Johns 208. Style 462 - No case in which it has been granted in case of Slander for excessive damages only. In Sty. 462 Misconduct of Party was (2 Wils 249. 1 Lev 97.) an ingredient -

Rule laid down in K B. is that a new trial may be granted for excessive damages in any case whatever - in any sort of action. 1 TR 277. Comy Dig.

Trial E 1. 4 TR 657, 5 Ib 257. Salk 649. 2 Bl R 929. 1327. 2 TR 166. And this appears to be the true Rule.

X. In Cont. New trials are granted by express Statute provision for mis-pleading - St. Cont. "Actions Civil"

But no such gen'l rule in English practice. Ex. Non suppose that in action of debt on bond where plea is infancy the Atty should plead Non est factum 3 Burr 1385. 1 East 639. 2 TR 131. 10 Mod 202-3. Bac Ab Trial L 5. - In 2 TR. 131 - Ch Jus. Buller remarks that it was proper to grant a new trial as the Court & the Counsel were both mistaken in point of Law, &

But the neglect of one's Atty or Counsel is no cause for a new trial - The remedy of the Client is on the Atty. & therefore the
6 Mod 22. 222. Salk 645. 3 Mod Ep. 84-112. 113- Bac. Trial L. 5.
As if Atty should neglect to appear &c

A new trial for mispleading has never been granted in Cont. except on petition never on motion.
The petitioner must state the wrong plea

& the plea he intends to make & he must state that he is able to prove the truth of the plea. And he must prove it on the ∓ hearing of the Petition.
1 Rodd 573. 3 Ro. 271.

How far mere surprize, by the introduction of unexpected evidence is a ground for a new trial, is not very clear. (Willes 10 Everton S. C.)
Mere surprize is not of course & of itself a ground for new trial (By English rule) tho' with other grounds it may be sufficient.
1 Bl R 298. Comy D. Trial E1-
3 East 167. 222. 2 Atk 319. Str 691. 3 Morgan 86-7. 2 Jd 131.

XI. The absence of material witness at the trial, tho' inevitable accident as by age, sudden illness, or other ~~acci~~ casualty.
See At Trial L 6 or 4. 11 Mod 1. 6 Mo 22.

(Such an absence is ground for a postponement or a continuance)

But a new trial for this cause is not granted unless the witness will make affidavit of what he can testify — that the Court may discover whether the testimony is material.
See At Trial L 6. Salk 645. 3 Morg 84 — 08)

New Trials.

And (Rent) new trial will not be granted if the defence to be proved is an unconscionable one -- For the trial will not be postponed in such a case. (a fortiori no new trial) 1 Bos & Pul 454.

In Conn: when application is by petition it must state the testimony, & before new trial is granted the witness must testify, on the trial of the petition, what he knows -
If the attendance of a material witness is prevented by Covin or unfair practice of the opposite party it is a good ground for a new trial - (as by arrest -

11 Mod 141 - Bac Trial L 6. part 72.

69 But if a witness is absent - wilfully, or by his own negligence - no new trial will be granted, for it is the policy of the Law to make the witness liable - and the opposite party is in no fault.
1 Burrow 322. Bac Ab Trial L 6. Salk 653.
"Title Evidence" - Trespass on the Case ex de
The party's remedy in such cases is by action on the Case vs the Witness -

And a new trial is never granted for the absence of a witness whose testimony the party wishing for it might by due diligence have obtained - it is in consequence of his own laches -
Salk 649. Str 691 - 1 Wils 98. 2 Mod 22.
Prec in Ch 194 - Bac Ab. "Trial" L 6 -

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A mistake made by a material witness in the testimony given on the first trial is not a ground for a new trial. Bac Ab Trial L 6. 3 Morgan Essays Sayer 28.

Neither for mistake nor forgetfulness - or any omission in his testimony - Bac Trial L. 6. Sayer 28. Rockwell vs Kellogg. Sup. Ct. N.Y.

XII. The discovery after trial of new & material evidence is said to be a good cause for new trial. 12 Mod 584. Bac Ab Trial L 6.

But in several later cases the rule is held contra. See 7 Term R 269. A Deft had been subjected in debt or assumpsit, & afterwards discovered a receipt & yet new trial was not granted.
See in Ch 194. Bac Ab Trial L 6.
And this latter opinion appears to be law in England.
1 Wils 98. 1 TR 84. 2 St 113. 713. 1 Bos & Pul 428. 430.
3 Mor 93. Sal 273

But yet in a very recent work of practice the rule is again qualified. 2 Arnbold 226. says that where new evidence is discovered after trial, & justice requires new trial it will be granted. 2 BCR 955. But it may be granted, on discovering that the testimony at the trial was false - the mistake or alias. 1 B&P. 428-30.
But it is clear that a new trial will not be granted on this ground to let the party into a defence of which he was apprised at the first trial - 2 TR 113. 1 St 84. 2 Arnbold 226 7 Tauns 309. In Conn.t newly discovered & material evidence is made ground for

new trial by Statute. And if by due diligence the party applying for a new trial might have known of the evidence before trial - New trial is not granted - Kirb 282-3 - 2 Sw. 270.

Application on this ground has usually been made (in Conn.) by petition - as motion must be made within 48 hours after verdict - but in Eng.d it is made by motion -

1) Petition must state the new evidence or the substance of the old - The witnesses to the new facts must be named tho' all need not be (Kirb 283. 2 Sw 270. 1 Root 89) testify on petition -

For Chap XIII see p. 52.

2) XIV - Misconduct of party. - as where one of the parties has treated the Jury - or by stratagem (as by falsely imprisoning him or arresting him by Corrupt process) with a view of preventing his testimony - (ante 68. 55) 11 Mod 141 - Bac Trial L 6.

Again where the party for whom the verdict was found, has importuned one of the jurors to find in his favor.

So where a party makes any representations in favor of his own side, to a Juror and the verdict is for him - (new trial granted even if evidence is decisively in his favor) 2 Roll 716. Bac Ab Verdict J. More 452 -

3) Similar practices by a party's attorney have the same effect - 2 Vent 173. Bac Ab Trial L 6.

And any kind of embracery practised by

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on of the parties - or his attorney. is a good cause for a new trial - 11 Mod 119. 1 Dent 125. Bac Ab Trial L 6.

The term 'embracery' is any attempt to in=fluence a jury corruptly, as by bribes, promises, &c. & Embracery is an indictable offence 1 Hawk Pleas of C 259 4 DE 140. 2 Dent 173.

It was formerly holden in Eng^d that a new trial should never be granted in an ac=tion of Ejectment. because in that ac=tion the judg^t is no estoppel - is not con=clusive - for unsuccessful party in (74)

Salk 648. 650. Bac Ab Trial L 7. (Str 1106 "except under special circumstances")
The parties are fictitious.
This rule is never applied in Conn^t. Here the Judg^t is final, as in other cases. The reason of the rule does not exist here. ("cessante ratione cessat ipsa lex")
(But now (1826) held by Sup C^t of Er. contra - Land reviews!)

In Eng^d. Rule now is that new trial is to be granted to Deft when the verdict is in favor of the Pltff - because the parties are not left in statu quo. he might in the mean time be turned out of possession.

But when the verdict is for Deft the gen^l rule still prevails - that a new trial shall not be granted Pltff "except for very particular reasons" - for the parties are in statu quo. it does not oust the possession
4 Burr 2224. Bac Trial L 7. 1 Burr 323 -

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75) It was formerly held that after two successive similar verdicts for the same party, a second new trial ought not to be granted - 1 Lev 97. 1 Sidr 131. Salk 649 - 6 Mod 22. 3 DE 387. 5 Com 155. Bac Trial L 1 -

And in point of fact a 2d new trial is not often granted tho' the rule is now exploded. Burr 2108. Ex. Case in Penna. say in 1798 or 1799.

A new trial is not in gen'l grantable upon any exception not made at the trial which might have been taken there. - 10 Mod 202 -3.

In gen'l new trials are not grantable on the Deft - in criminal cases of any kind tho' frequently they are in his favor - Coup 37. 3 Mass. 108. 2 Str. 899. 1238. 12 Wils 87. 3 Bl 59. 1 Rest 86-7. ante 6-7) -

76. In criminal prosecutions for offences high=er than misdemeanors a new trial is never grantable for either party. For it is a maxim. "That no person shall be twice put in jeopardy of his life". 6 TR 638.

How far the Court may discharge the Jury on their failing to agree in a verdict has been a subject of much controversy - In Felonies (in Eng.) take it to be that they cannot be discharged - 2 Hawk Ch 47 §1 - Foster's Crown Law 16.

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Hinlock's case) Raym 84. 4 Co 45. Carth 46s. Comberb. 501. 2 Johns 301. 18 Vt (Goodwin's case) Jury not even with prisoner's consent
(Let it be understood that without a verdict there is no trial.) but this rule means that he can't be put twice in jeopardy of his life -

Doctrine laid down in Cooke's case. is -
That Jury can not be discharged in ~~Capital~~ Capital cases, ~~for~~ for their disagreement, except in cases of clear physical necessity - as if juror died - But in Conn: new trials have been granted in favor of the Deft - even after conviction - So by the Judiciary Law of the U S. 1 Root 86-7-

But where the offence ~~is~~ does not amount a misdemeanor i.e. where it does not amount to Felony - the gen'l rule is that no new trial can be granted agt the Deft. "No man can be twice tried for the same offence - (77)
Str 899. 1238 - 101 - Bid 154. 1 Lev 124. 2 Ray 63 2 TR 484. 1 Wils 17. 3 Vt 59. 1 Root 86-7. Bac - Trial "L 8. 1 Burr 316 - Burr 253.

But when the offence is not higher than a misdemeanor the Court may grant a new trial in favour of Deft - 6 TR. 638. Str. 968. 2 Ray 63 - Stra 1102 - Bac Trial Lg. 5 Burr 2669. in case of libel - so of perjury - Doug 760. 1 East 159.

But of late new trials are granted agt. deft in actions on Penal statutes for mistakes of the Judge in point of Law - But these are Civil suits - 4 TR 753 - 758. 5 Vt 20. 3 East 451 - 3 Burr 1128.

New Trials -

But new trials in these actions have not been granted on the ground of a mis-take in the Jury - on the ground that the verdict is against evidence -
4 Tr 758. 5 Tr 20. 3 Mory. 108. Str 897. 1238. 12 Wils 17. 3 Tr 59.

But a new trial may be granted in Deft if he has obtained an acquittal by any fraud practised - as by bribery &c - Crown on an indictment. Str 1238. Sal 646 - 12 Mod 9. Bac Ab. Trial L 8. Mod 93. (Contra 1 Lev 124 cited 12 Ld Ray 63 -) Say 90. 15 How. 336.

Granting a new trial after judgt. in Commt. vacates the judgt. But terms are imposed when necessary.
* See next case - infra -

(30) When there have been one or more new trials the question of costs presents some difficulty - according to English practice. Where the costs are directed to abide the event - if the party who was successful on the first trial succeeds again he shall have the costs of both trials -

If the party who obtained the new trial prevails on the second trial, he has the costs incurred on the 2d trial only - & the costs of the 1st trial are taxed neither way. 8 Tr 619 - 17 Ves 639 - 641 - 3 Tr 569.

The rule in Comm. is more simple - that the whole costs shall follow the final de-termination of the suit -

New Trials -

X. See next page supra

And in a qui tam prosecution new trial (78)
cannot be granted as to the civil part - unless
it is grantable & granted as to the criminal
part - 1 Root 86-7.

In Conn.t if pending the petition for new
trial, the respondent dies - his executor may
be cited in by ci: fa: (as in actions) & the
petition may proceed, provided the right of
action survives to or ag.t the executor according
to the nature of the case i.e. to him, if his
testator was Plff in the action, ag.t him if
his Testator was Deft - "Pleas &c" Sup Ct. Hart=
=ford Co.y Feb.y 1800.

(Note. as to the last case, that the Stat. rela= (79)
=ting to "abatement & amendment of writs"
was made before our courts had power to
grant new trials - But see. Rev. Rev 273 &c)

If the right of action does not survive - in
the last case, the petition must abate - Be=
=cause no new trial can then be had -

Subject to the foregoing qualifications, the
petition might, doubtless proceed, if pending
the petition - the petitioner should die -

In Eng.d when the costs are directed to abide (80)
the event if the party who was successful on the
first trial - succeeds again - he shall have the
costs of both trials:

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But if the party in whose favor the new trial is granted, prevails on the second, he shall have the costs of the second trial only. Yet in this case the other party has not the costs of the first trial. These are not taxed on either side. 8 Ch 619 - 1 Ch Ca 139 - 41 - 3 Ch 507 -

In Conn.t the whole costs generally follow the final court of the suit -

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